No. 733

In the Supreme Court of the United States

October Term, 1967

PERMA LIFE MUFFLERS, INC.; et. al.,
Petitioners,

vs.

INTERNATIONAL PARTS CORPORATION; et. al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS

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April 1968

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RULE AND STATUTES INVOLVED

The pertinent portions of Rule 56 of the Federal Rules of Civil Procedure are set forth in Appendix A hereof. The other statutes involved are set forth in Appendix A to petitioners' brief.

QUESTIONS PRESENTED

1. Does the doctrine of *in pari delicto* constitute a defense in a private antitrust action for treble damages?

2. Did the court of appeals and the district court correctly apply the *in pari delicto* defense in dismissing two counts of an antitrust complaint under the particular circumstances of this case where the undisputed facts show that the plaintiffs voluntarily executed initial franchise agreements, helped to formulate the new Midas plan for merchandising automotive exhaust systems, fostered and participated fully in and benefited from the growth and development of the allegedly illegal and restrictive program, sought even more franchises, and finally terminated the agreements only when defendants' competitor offered them even larger exclusive territories?

3. Did the courts below correctly hold that there was no genuine issue as to the fact that the activities of the individual and corporate defendants here were those of a single integrated business entity so as to preclude any finding of a combination or conspiracy among them?

4. Did the courts below correctly sustain the use of summary judgment procedure to dismiss two of the three counts of an antitrust complaint?

STATEMENT OF THE CASE

1. The Pleadings, Discovery and Summary Judgment Motion

The thrice-amended complaint (A 6-45) was filed on October 19, 1960 by seven separate corporations and six individual proprietorships which were owned and operated by five individuals—Gregory Skarupa, Maxwell Ross, Joseph Pierce, Claude Wheeler, and Paul Morris. The present four plaintiffs[1], after being licensed under franchise agreements with defendants to use the trade name, trademarks and service marks identified as "Midas" and "Midas Muffler Shops", had operated twenty such shops throughout the nation. Named as defendants were International Parts Corporation, three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants. These ten technically separate legal persons constituted the single trading entity by which Nathan Sherman and his son Gordon Sherman conducted their family-owned business (A 64-65).

The gravamen of plaintiffs' allegations was that the Midas Muffler Shops should have been operated in a manner different from that provided by the franchise agreements. Particularly, plaintiffs asserted that they should have been allowed to use the retail shops identified by the Midas trade and service marks to sell and install non-

[1] Morris voluntarily dismissed his complaint in January 1962, so that "plaintiffs" or "petitioners" refer to the remaining four individuals. Throughout this brief A refers to the Appendix, R to the Record and PB to Petitioners' Brief. Emphasis within quotations is supplied unless otherwise noted.

Midas exhaust parts and a wide variety of "allied automotive products."[2]

Count One of the complaint alleged violations of Section 1 of the Sherman Act through horizontal conspiracies among "the defendants and other co-conspirators *unknown*" (A 17-18). The defendants, among other things, allegedly conspired and/or agreed and/or combined to establish the Midas franchise program, agreed as to who could become Midas dealers, determined the alleged illegal terms of the franchise agreement, and fixed the prices of the exhaust system parts sold by defendants.[3] Count Two alleged violations of Section 3 of the Clayton Act by virtue of the exclusive aspects of the merchandising system through which defendants sold Midas brand exhaust system parts (A 18). Count Three alleged violations of the Robinson-Patman Act and is not presently before the Court (A 18-19). Plaintiffs did not seek *reimbursement for losses by the action since each plaintiff enjoyed substantial profits* during his relationship with defendants; on the contrary, plaintiffs sought as "damages" *additional monies* which they contend they would have attained if the Midas Muffler Shops had been operated in the manner they deemed best.

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[2] "Automotive exhaust system" parts are essentially the muffler, the exhaust pipe, the tailpipe and clamps to hold them in place (A 8). "Allied automobile products" are defined in the complaint as including "springs, shock absorbers, windshields, batteries, oil filters, seat covers and convertible tops" (A 9).

[3] Petitioners' present theory of a "combination" in violation of Section 1 (PB 40) through "hundreds" of vertical contracts between defendants and the *known* franchisees including plaintiffs themselves, was not alleged.

Plaintiffs initiated the discovery procedures and by September 1961 had examined hundreds of defendants' documents and had completed the depositions of five individuals, which covered 1036 pages of testimony. No further discovery was initiated by plaintiffs after October 1962, at which time they served extensive interrogatories, answers to which were subsequently filed by defendants (R 288-309, 429-45, 1032-52).

In October 1961 defendants commenced their discovery. Each plaintiff purported to produce all documents relevant to the charges and 350,000 of these documents were inspected by defendants. By November 1962 defendants had completed extensive depositions of the four plaintiffs, totaling 1605 pages of testimony. Subsequently, defendants served general interrogatories on all plaintiffs and separate interrogatories on each plaintiff, answers to which were filed in December 1964 and February 1965 (R 446-556, 577-1031). On June 30, 1965 the district court ordered that all discovery be completed by August 6, 1965 (R 1053), and following defendants' motion in August 1965 to compel further interrogatory answers or to preclude the introduction of evidence, plaintiffs filed supplemental interrogatory answers and produced additional documents (R 1132-39).

Shortly after the pretrial conference of August 6, 1965, defendants filed a motion for summary judgment (A 61-63) supported by an affidavit of defendants' principal executives, Nathan and Gordon Sherman, (A 64-72) and by the plaintiffs' deposition testimony and exhibits and plaintiffs' interrogatory answers which record facts were summarized for convenience of the district court in a

separate "Appendix"[4] (A 73-105). As to Counts One and Two of the complaint, defendants, in the first instance, assumed for purposes of the summary judgment motion that the franchise arrangement was illegal but asserted that the undisputed material facts established that plaintiffs were active, complete and voluntary participators in conjunction with defendants in any alleged illegal arrangement and, as a matter of law, could not premise a right to recover treble damages on their own illegal conduct (A 61-62). Alternatively, as to the contractual allegations in Counts One and Two, defendants asserted that the franchise agreements and merchandising methods were reasonable and lawful (A 62). As to Count One, defendants also asserted that defendants were a "single trader" and as a matter of fact did not, and as a matter of law could not, conspire to violate the Sherman Act (A 62a). The final portion of the motion was concerned with the Robinson-Patman Act charges in Count Three (A 62a-63).

Plaintiffs filed no affidavit in response to defendants' motion but merely submitted an "Opposition to the Motion for Summary Judgment" (R 1234-1312), which document was not even included by petitioners in the Appendix to this Court. As noted by the district court (A 111, 112-13, 118, 120), this "Opposition" was an argument of counsel insufficient under Rule 56(e) (App. A, *infra*) to contradict any fact set forth in defendants' affidavit or appendix. On February 25, 1966 the district court granted summary judgment on Counts One and Two but on the

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[4] Defendants' motion was premised not upon the "depositions of the parties" (PB 5, note 7), but upon the depositions and interrogatory answers of plaintiffs. Neither the Appendix nor the Sherman affidavit was ever challenged as to accuracy or authenticity by the plaintiffs below.

basis of plaintiffs' assertion that they were entitled to further discovery on Count Three, denied summary judgment on that Count without prejudice to the renewal of the motion after defendants further answered plaintiffs' interrogatories (A 108-15). Defendants answered such interrogatories (R 1417-21) and filed a renewed motion for summary judgment (R 1422-32) which was then granted as to Count Three (A 116-22).

Since petitioners have disregarded virtually all of the undisputed testimony in their recitation of the facts (PB 7-14), respondents have been compelled to now set forth the relevant and material record facts.

2. Midas History

Prior to the introduction of the Midas franchise plan by defendants in 1955, exhaust system parts were sold to consumers from innumerable retail outlets, such as garages, gas stations, and in particular by the dealer service departments of the giant automobile manufacturers. A muffler was merchandised like most other automotive replacement parts, was given no special attention, enjoyed no consumer brand consciousness, and required a labor charge for installation (A 65-66). Defendants hoped to change all this with the introduction of Midas as a nationally advertised trade name, backed by a nationwide chain of specialized exhaust system shops featuring a unique guarantee and free fifteen-minute installation. A network of independent franchised dealers—each owning a retail outlet identified by the various "Midas" trade names and service marks—would invite the public to an automotive shop specializing in exhaust system parts (A 66-67). The dingy surroundings of the typical auto repair shop were to be replaced by the Midas atmosphere of cleanliness,

comfort, and prompt, courteous service (A 69). The guarantee of a new Midas muffler free to replace any that wore out so long as the customer owned the car was to be honored in each shop no matter where the first muffler was purchased (A 68). Free fifteen-minute installation by the dealer would be made economically possible by cost savings resulting from direct purchase from International Parts by Midas dealers at the price heretofore available in the automotive industry only to jobbers or wholesalers (A 68).

From infancy Midas was dedicated to cooperation with its dealers; it sought their suggestions and relied on their experiences in and before the program to promote and foster Midas growth and development. Plaintiffs Ross, Pierce and Skarupa, customers for International Parts brands in former years, were three of the dealers who pioneered with Midas in evolving its concepts.[5] When Wheeler signed his first contract in August of 1956 as the last plaintiff to join, there were approximately 30 Midas shops in the entire country in addition to those operated by plaintiffs.

Success for this new merchandising concept, and for each Midas dealer, necessitated that the American motorist recognize the Midas name and have confidence that each dealer was an exhaust specialist who handled the same quality product, provided the same clean and comfortable surroundings, gave the same prompt and dependable service, and honored the same unique Midas guarantee (A 68-69). Over three and a half million dollars were spent

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[5] Speaking as of March 1959, Ross described himself and Wheeler as then "old-timers . . . we fellows *who had originated with the program* . . . had gone through all this stuff time and time and time again" (Ross Dep. 293).

by defendants on national advertising to publicize this Midas story through all media: television, radio, billboards, newspapers and magazines. Individual Midas dealers, particularly these plaintiffs, coordinated local advertising using the Midas name and symbols with defendants' national program (A 69).[6]

Emphasizing the cooperative nature of this undertaking, a national association of Midas dealers held national and regional meetings, and a monthly magazine, the "Dealer Dabbler," advised each dealer of experiences of his distant fellow dealers and the development of the national Midas image (A 71). All of the plaintiffs attended the first national meeting of all dealers which was held in Chicago in March 1957 (Ross Dep. 284, Pierce Dep. 91, Skarupa Dep. 148, Wheeler Dep. 78-79).[7] As Midas grew, a National Advisory Council of ten select dealers was appointed to represent all dealers. This group, including Ross, Skarupa and Pierce as initial members, was made up of those dealers most active and interested in the Midas image and who had attained the greatest success. The Council met first in Asheville, North Carolina in October 1957 (Ross Dep. 284-87, Pierce Dep. 165, Skarupa Dep. 166) and met periodically thereafter to discuss with each other and the defendants ways and means of improving the whole Midas program (A 71). Regional meetings of dealers on at least an annual basis occurred during 1958-1960, many of which were attended by these plaintiffs (Ross Dep. 291, Pierce Dep. 166-67, Skarupa Dep. 164, Wheeler Dep. 138).

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[6] See Argument, *infra*, note 25, p. 61 and the Appendix (A 49-53) for samples of such advertising.

[7] Complete deposition testimony of all plaintiffs' and defendants' witnesses is separately included in the record filed here, but the pages were not given record numbers so that references throughout are to the actual pages of the deposition.

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Plaintiff Ross described generally the function of these meetings and the National Advisory Council:

> "As I understand it, *the function of this National Advisory Council was* to meet upon suggestions from headquarters in Chicago at their expense to discuss all phases of the operation. It was a discussion of ideas, *an exchange of ideas,* covering all phases of the operation, whether it was installation techniques or advertising methods and ideas of selling techniques, *anything* of a general nature *that would promote and help the program for the benefit of everybody in the program.*
>
> "By 'program' I mean—call it an organization; call it a society; call it on affiliation. I don't know what you care to call it. *It was a group of people with a common purpose in mind.* (Ross Dep. 284-85)
>
> * * *
>
> . . . the next actual meeting at which we confronted ourselves in person, I believe, was at Asheville, North Carolina, I believe, in October of 1957.
>
> Q. Do you recall any discussions as to Midas policy at that meeting?
>
> A. May I say for the record that *these were very comprehensive discussions.* They went on from morning to night. When I got through I was washed up. I don't remember specifically anything particular. We may have covered every topic we are discussing here this afternoon, but specifically what was discussed or what topic was discussed or what was said, I don't remember." (Ross Dep. 287)

In his own words, Ross thus made it clear that all the dealers contributed ideas and policies which became part of the Midas concept, that the "program" meant plaintiffs and defendants working together, and that policy decisions were not made by defendants alone. Ross also claimed credit individually for instituting several aspects

of the Midas program including the whole idea of a field counselor, "a traveling mindpicker . . . who would visit in the various shops to see what was done here that could be improved in the other shops. . . ." (Ross Dep. 287-288, 290), the method by which market penetration could be ascertained (*Ibid* 282-83), placing the Midas operator's name and address on the guarantee form (*Ibid* 288-89), and the adoption of "accounting policy and procedures, especially insofar as multiple shop operations were concerned" (*Ibid* 289).

At these meetings of dealers and the National Advisory Council the participants discussed and voted upon policies concerning the alleged illegal restrictions with respect to resale price maintenance (*Ibid* 296-97), wholesale sales (*Ibid* 290), and the sale of shocks and springs or other similar items (*Ibid* 294-95). For example, on one occasion "it was the consensus of the National Advisory Council at that meeting that wholesaling should be discontinued" (*Ibid* 290). Revision of the franchise, particularly with respect to territory, was also discussed (*Ibid* 297).

One important policy question decided by the dealers in the early days of the program was the role of the guarantee which also involved fixing the entire burden of its administration on International Parts. At the March 1957 national meeting most dealers eagerly requested defendants to make the guarantee a keystone of the Midas concept, but Mr. Pierce doubted its desirability; he thought he could sell as many mufflers without the guarantee as with it:

> "To me, it was ridiculous and I voiced my opinion at the first meeting when they applied the hundred

percent guarantee to the Midas franchise, and I told them at that time, . . . 'I consider the guarantee [covers only] factory defects and workmanship and material.'

"So then, the thing started to snowball and *the* [new Midas] *dealers got into it,* and they interpreted the guarantee different than we did. They said it was a hundred percent unconditional guarantee. I argued the point with them, [but] the dealers, the majority of the dealers felt it was a hundred percent guarantee, *so Midas decided to go along* on a hundred percent basis, but it was questionable at the time.

Q. This was in March '57?

A. The first meeting, and I think the dealers forced the issue on that point. I don't think they ever intended to start a 100 percent guarantee. In my estimation, it was a mistake, but the *dealers did force that issue.*" (Pierce Dep. 175-77).

As part of the program, a franchise agreement licensing the use of the trademark "Midas" and the service mark "Midas Muffler Shop" was tendered to each prospective dealer. Although four forms of contract are involved here, none of them required a franchise fee or purchase of capital equipment from defendants, and all were cancellable by either party on thirty days' notice (A 70). Since no prototype building or lease of real estate or other equipment from Midas was necessary, the use of the premises was unrestricted upon termination or cancellation (A 70).

From nothing in early 1955, Midas grew to 120 shops by 1957 and to 268 at the time plaintiffs terminated their franchises in 1959 (A 71-72). Midas brand sales were estimated at $4 million in 1957, $6 million for 1958, and

$8 million for 1959 (Jacob Dep. 170).[8] After obtaining their first Midas franchise agreement most dealers, including plaintiffs, subsequently opened additional shops. In partnership with Midas, the plaintiffs, individually and collectively, shared in increased sales in each succeeding year during their participation in the Midas program:

	1956	1957	1958	1959
Skarupa (R. 493)	$ 61,965	$ 210,484	$ 384,239	$ 488,468
Ross (R. 912)	90,245*	284,198*	289,659*	334,171
Pierce (R. 694)	357,253	507,657	592,400	685,870
Wheeler (R. 825)	8,510	180,445	253,949	265,914
Total	$517,973	$1,119,464	$1,494,903	$1,774,423
Midas Sales	Unavailable	4,000,000	6,000,000	8,000,000

* $94,996 of Ross' sales in Minneapolis from 1956 to 1958 have been allocated to these years on the basis of $3,000 per month per location since Ross professed an inability to identify such sales other than in toto.

3. Plaintiffs' Participation in the Midas Program

Plaintiffs' wholehearted and complete involvement in the Midas program was described at length in their deposition testimony and chronologically summarized in defendants' trial court Appendix (A 73-105).

The four plaintiffs' participation was remarkably similar. Each sought out defendants and voluntarily executed an initial franchise agreement, and each subsequently

[8] Total International Parts sales of all brands and all products including Midas were approximately $5 million in 1955, $7 million in 1956, $11 million in 1957, $13.5 million in 1958, and $17 million in 1959 (Defendants' response to plaintiffs' subpoena *duces tecum* March 5, 1961).

requested and executed additional franchises. As pioneers in the program each was a member of the National Advisory Council and contributed his ideas and thoughts to the evolution of the Midas merchandising concept in its formative years. Each of their twenty shops bore the name "Midas Muffler Shop" and displayed Midas advertising material. Each of their local advertising featured the Midas name and the Midas program—the specialist in mufflers, free installation, and the unique guarantee.

Each plaintiff started with a nominal capital investment, yet reaped enormous profits. When offered what they thought was an opportunity for greater profits with a competitive franchise, three of the four unilaterally *abandoned* the Midas program, and entered a similar program offered by an International Parts competitor under the brand name "Robin Hood."[9] Each assigned as a specific reason for his dissatisfaction with Midas the fact that Midas would not shield him from competition by granting him an "exclusive franchise" for larger areas in which he wanted to do business.

(a) Gregory Skarupa:

While a full time government employee with no prior business experience, Skarupa, through a brother-in-law, sought defendants' guidance in late 1955 in opening an In-

[9] Maremont Corporation sponsored "Robin Hood." Its national sales manager was an ex-Midas field counselor who had known the plaintiffs in the early Midas days and later solicited each of them on behalf of Robin Hood. It sought to emulate the Midas program, but its dealers sold items other than exhaust systems and there was no manufacturer's guarantee on the featured muffler. Plaintiffs uniformly suffered losses in this venture (A. 81-82, 89-90, 97, 101-104).

ternational muffler shop in the Washington, D.C., area (A 76-78, 146). His first Midas franchise agreement for Wheaton, Maryland was signed in March 1956 because "I *was interested* in the Midas program *provided* I *got* assurances from him that the *Washington metropolitan* area would be assigned to me *so that* if I developed it *I could reap the benefits of such development*" (A 77, 147). Having profited from the program and participated in it completely, (A 79-80) Skarupa executed three more Midas franchise agreements in December 1956, in May 1957, and in July 1958 (A 78-79).

Skarupa's principal complaint was that he was limited in his further expansion in the Midas program (A 80-81). He terminated his four franchises because he couldn't obtain franchises for three more Midas shops he wanted to open (A 148) and for which denial he is now seeking damages (A 155). Not satisfied with an offer of one more Midas shop, he wanted to monopolize and profit from every possible Midas Shop in the Washington, D. C. area. He obtained this exclusive territory when he unilaterally terminated his Midas franchise with defendants in 1959, and immediately joined the Robin Hood program (A 81-82). Ironically, defendants' concurrence in Skarupa's plan would have supplied the basis, according to plaintiffs' present legal position, for Skarupa now to claim more substantial antitrust damages, since his profitable operation of seven Midas Shops would have resulted in even greater financial "injury" than his profitable operation of four Midas Shops.

Plaintiff Skarupa, in four years as a Midas dealer and on a minimal investment of $9,800, enjoyed a mercurial rise from a $7,700 a year government clerk to $80,000 in one

year as a proprietor of four Midas shops (A 83). After a profit of over $200,000 from his four years' participation in the Midas conspiracy, Skarupa now seeks an additional $800,000 profit as "damages" (A 83-84), plus $20,000 per year for each store he didn't open (A 155).

(b) Maxwell Ross:

Ross, proprietor of a Muskegon, Michigan wrecking yard, wanted the Midas image—the guarantee, the advertising and the quick service (A 85). "*I thought that this [Midas] was a good idea.* I thought that it was *a way of making some real money* if you got into it *quickly* . . . The thing that *excited me was the guarantee, . . .*" (A 138). The franchise, now claimed to be illegal, was then viewed as "*an avenue for sales and profit for me.*" (A 137). Merchandising exhaust parts by national advertising as originated by Midas was a "novel and new" concept which had a "tremendous" impact (Ross Dep. 281) and which gave his business "more substance, more credibility" (Ross Dep. 313).

The first plaintiff to join Midas, he executed his first franchise for Muskegon, Michigan in December 1955; another for Grand Rapids followed in May 1956. After "a good measure of success in the Muskegon and Grand Rapids areas," he opened two shops in Minneapolis. "I liked the program. It was making money for me. I wanted to get into a larger metropolitan area, and Minneapolis was open." "*I wanted not only the Minneapolis* [*area*] *but* [*alsa*] St. Paul." (A 135).

When Minnesota proved too much for him, he came back to Michigan and signed new franchises for Kalamazoo (April 1958) and Battle Creek (May 1959). Defendants'

discouragement of his opening still another shop in Grand Rapids was one of his assigned reasons for cancelling Midas (Ross Dep. 172-76), which he did by letters of November 13, 1959 (A 168-69) after Robin Hood, with whom he had been discussing franchises for several months, gave him all of Michigan as his exclusive territory (A 89).

Disappointed in his failure in Robin Hood after four successful years with Midas, Ross now seeks to recover from Midas over $488,000 in alleged "damages" in addition to $150,000 in Midas profits (A 91).

(c) Joseph Pierce:

Plaintiff Pierce was the operator of three muffler shops in upstate New York which featured International Parts products and had been established in 1954-55 with the assistance of defendants prior to the development of the Midas program (A 92-93).

Midas was first considered by Pierce in March 1956 when he and an International Parts representative visited a Midas Muffler shop in Buffalo and discussed the Midas program with the shop owner (A 93). Pierce was informed that Midas Shops were to be opened in upstate New York and that existing purchasers from International Parts were to be given the first opportunity to obtain the new franchises. "So as not to invite competition," (A 125) from any new Midas dealers, Pierce signed his first Midas franchise agreements on April 1, 1956, for the three existing Pierce Muffler Shops in Binghampton, Syracuse and Utica (A 94). But, contrary to the implications of Petitioners' Brief (p. 7) Pierce was not then cut off from International brand auto exhaust systems; he continued to buy and sell

them for his retail stores throughout his association with Midas (A 131).[10]

Pierce immediately began searching for additional locations for Midas Shops and in the course of his search helped convince a friend to become a Midas dealer in Albany, one of the locations at which he looked:

> ". . . . I explained the program to him. I told him I was enthused about it and he seemed to like it, so eventually, he became a Midas dealer." (A 128).

He also accompanied a friend to Chicago who inquired about a possible Midas franchise (A 94).

Pierce did find other locations; by June 1956, he had opened his fourth Midas Shop, a second shop in Syracuse, and by May 1957 he had obtained locations in Rome and Elmira and signed Midas franchise agreements for these two shops. Without even asking defendants for another Midas franchise agreement, Pierce renewed his expansion in 1958 and opened his seventh Midas Shop, in Mattydale, a suburb of Syracuse (A 94).

Pierce was dissatisfied with the change in the guarantee from a 100% charge against Midas to a 50% split with the

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[10] "Q. During the time that you were in the Midas program, did you continue to sell International brand mufflers and other items through your retail locations?

A. Yes, sir, to some extent.

* * * * *

A. The question is whether our sales at the retail stores were about the same as they were—

Q. For International brand?

A. Yes, approximately; probably would be a little bit less on account of the muffler competition that was coming in at that time." (Pierce Dep. 47-48).

dealers,[11] and in February 1959 wrote defendants and threatened to exercise his option to terminate his Midas franchises (A 171). Suggestions of termination and sale of another exhaust system brand were subsequently repeated by Pierce (A 95). In June 1959, he did terminate the franchise at Elmira and began to sell a competitive brand muffler from his other Midas Shops (Pierce Dep. 98-99) and to advertise non-Midas products under the Midas name (A 51-52). He admitted selling Texas brand tailpipes and Nu-Era brand mufflers at "all [his] your locations" and that the consumer might have been deceived as to even the brand of muffler Pierce sold him or what guarantee he was obtaining.[12]

After Pierce had reduced the high unpaid balance on his account, which had existed since his threat of cancellation, defendants accelerated Pierce's proposed cancellation by exercising their contractual right to terminate (A 96-97). Pierce made no effort to reinstate the franchises. In fact he offered willingly "to cooperate fully with your request to terminate the Midas franchises we hold" (A 172). He continued to do business at the same locations purchasing "Arrow" brand mufflers from Maremont on the condition that no Robin Hood competition would be established in his territory (A 97).

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[11] Pierce's initial reservations about the guarantee is described, *supra*, pp. 11-12; the background of the change in guarantee expense and its implications are discussed, *infra*, pp. 64-66.

[12] Q. Would you issue a guarantee on a Nu-Era muffler?

A. Our own guarantee.

Q. How did that differ from the Midas guarantee?

A. It didn't differ.

Q. Did the customer know whether he was getting your guarantee or the Midas guarantee?

A. I can't be sure of that, no. (Pierce Dep. 153-54)

Pierce benefited to the extent of at least $180,000 from his four years with Midas but now seeks "damages" exceeding one million dollars (A 97-98).

(d) Claude Wheeler:

A Life magazine advertisement seeking new Midas dealers which plaintiff Wheeler saw in 1956 changed his financial position, in three years, from a $6,000 a year pool room proprietor to $34,000 in one year as a proprietor of three Midas Muffler Shops in the St. Louis area (A 98-100). Wheeler "answered the ad" (A 156), and defendants thereafter assisted him in starting his business by arranging for his education in an existing Midas Muffler Shop and in helping him find a suitable location in St. Louis (A 99-101). His first "Midas Muffler Shop" was opened in September 1956 (A 100).

Although fully aware of the franchise provisions and Midas merchandising methods, Wheeler immediately sought more shops, so that he could preclude prospective Midas dealers from entering the St. Louis area. New stores were opened in St. Louis in March 1957 and June 1959 and in East St. Louis, Illinois, in July 1957 (A 100-101).

Wheeler, who was the first plaintiff in the program to terminate his Midas franchises, weighed that decision for a year to determine whether defendants would give him exclusive rights in the St. Louis area or whether he should accept such rights from defendants' Robin Hood competitors (A 101-102). Following his notice of termination of the Midas franchises, two Midas field counselors met Wheeler in his St. Louis office and begged him to retract his letter and stay in the Midas program. Wheeler was adamant and a few days later Gordon Sherman came

to St. Louis in an effort to change his mind. Wheeler said he was willing to stay with Midas if Midas would cancel the new franchisee in St. Louis and if he were thereby given "an exclusive franchise". "I told him I also wanted a hundred percent guarantee arrangement" (A 102-03; Wheeler Dep. 179). When defendants would not agree to these conditions, Wheeler began operating out of his Midas locations under the Robin Hood name and with the addition of shocks, springs, brakes and other products and services (A 103).

Despite the sixfold increase in his annual earnings and over $100,000 in personal profits in three years with Midas, Wheeler now seeks an additional $439,544.06 as "damages" (A 104).

4. The Decisions Below

After both courts below completely reviewed the record, it was obvious to them that there were no genuine issues as to the facts material to the decision herein. As the trial court said:

> "They are . . . *in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. . . . They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain." (A 109).

The court further found that:

> "[T]here has been no showing whatsoever of coercion, economic or otherwise. The depositions of the individual plaintiffs . . . uncontroverted except by counsel's arguments, reveal that each plaintiff signed franchise agreements freely and voluntarily 'as a way of making some real money' (Ross, Dep. pp. 238-40). . . . *It is*

further *undisputed* from the record before us *that each plaintiff sought to expand his market area* after initially gaining a franchise, *sought to obtain additional franchises* thereafter, and *sought to create a monopoly for themselves* and defendants within specified territorial limits. Further, each plaintiff retained ownership or control of the premises at which his muffler shop was located, paid no franchise fee to defendants, and was able to terminate the agreement unilaterally on thirty days' notice. Under no circumstances could 'coercion' be said to have been a factor herein" (A 110).

With respect to the contention that the defense of *in pari delicto* was no longer available in antitrust cases as a result of *Kiefer-Stewart*, 340 U.S. 211 (1951) and *Moore v. Mead Service Co.*, 340 U.S. 944 (1951), the district court pointed out that the violation here was alleged to have taken place "*in conjunction* with defendant" and that defendants were not relying on a separate violation of law by the plaintiffs or the defense of unclean hands. In conclusion the court stated:

> "We are thus satisfied on the papers presented to us that no genuine factual controversy exists, and that defendant is entitled to summary judgment . . . on Counts I and II." (A 111).

As an alternative ground for dismissal of the conspiracy allegations in Counts I and II, the court pointed out that under the undisputed facts "the corporate and individual defendants were a single business entity through which a family business was operated, and that, therefore, as a matter of law, no conspiracy existed among them in violation of Section 1 of the Sherman Act." (A 111). He pointed out that the individual defendants acted only as corporate agents in their normal employment capacities,

and that there was no evidence "except in plaintiffs unsupported arguments that these corporations competed with each other or acted in any manner other than as a single integrated business. . . . Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act" (A 112-13).

In affirming, the court of appeals (one judge dissenting) pointed out that:

> "The deposition testimony of each of the plaintiffs is highly significant and, standing alone, completely refutes any notion that their participation in the Midas program was other than on a voluntary basis, or that they were coerced in pursuing a course which they now claim was illegal and for which damages are sought." (A 209.)

The opinion sets forth in considerable detail excerpts from those depositions (A 209-11) and distinguishes this court's decision in *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), on the grounds that this Court did "not mention *pari delicto* and we think it did not intend to annihilate a principle so long imbedded in the law" (A 212). The court also pointed out that the facts of this case "are a far cry from those considered by the Supreme Court in *Simpson*" (A 212) and then concluded:

> "In resume, each plaintiff initially asked to become a participant in the Midas merchandising program . . . Each plaintiff thereafter eagerly sought additional shops . . . Each plaintiff at all times had the legal right to abandon the Midas program . . . Three of the instant plaintiffs unilaterally terminated their franchises when it suited their convenience and the fourth acquiesced in the termination of his franchise. Furthermore, each plaintiff cooperated with defendants and all other Midas dealers in the conduct which plaintiffs now

assert was illegal and injurious to their business and property. Each plaintiff accepted the benefits arising out of the franchise agreements and earned substantial and significant profits during the terms of such agreements. Each plaintiff sought to perpetuate the 'wrong' of which he now complains by acquiring additional franchises, . . .

"It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court." (A 214-15)

With respect to the alternative grounds for dismissal of the conspiracy allegations, the court of appeals stated its agreement with the reasoning of the district court quoted above (A 215).

SUMMARY OF ARGUMENT

I. The undisputed facts showed that each of the four plaintiffs voluntarily joined with defendants in the initiation of the Midas franchise program now claimed to be illegal under the antitrust laws, and that each of them participated in, helped to develop, and profited from that very same allegedly illegal system of distribution. The courts below correctly concluded that plaintiffs were *in pari delicto* with defendants and thus barred from recovering any alleged damages.

A. The doctrine of *in pari delicto* is firmly established in the law; it originated in the common law and has been consistently applied from earliest times by this Court and by the other federal courts in restraint of trade cases, both before and after the time when the Sherman Act provided a treble damage remedy.

B. No decision of this Court has purported to abolish the *in pari delicto* defense in antitrust cases. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) and *Moore* v. *Mead Service Co.*, 340 U.S. 944 (1951) overruled defenses of "unclean hands" on the basis of considerations entirely different from those involved in the *in pari delicto* doctrine. The defense is still applied on the proper facts in antitrust cases by the courts of appeal and the district courts.

Exceptions to the *in pari delicto* doctrine are recognized when the complaining party has been "coerced" so that he becomes a "victim" of, rather than a "participant" in, the alleged illegality; in such cases the restraints have been imposed solely for the benefit of the defendant. An exception is also recognized for those plaintiffs who have withdrawn from an alleged illegal plan or for those who seek only to restrain enforcement of the illegal agreement in the future.

Simpson v. *Union Oil Co.*, 377 U.S. 13 (1964) was decided solely on the basis of "consent" by the plaintiff to an antitrust violation. Legally and factually mere "consent" is not the same as *in pari delicto* where the complainant participates in and benefits from the illegal activity.

C. The *in pari delicto* doctrine clearly applies here. These plaintiffs collectively and individually embraced the new Midas franchise system of distribution—an image of specialization in the sale of exhaust parts under the trade and service marks "Midas" and "Midas Muffler Shop" by a nationwide network of shops supported by extensive national advertising and featuring free fifteen-minute installation and a unique guarantee. At plaintiffs'

request, exclusive territories for them were a part of that system and they benefited from the restrictions on resale and on price competition which were corollaries of their insistence on exclusivity within their areas. Each plaintiff participated in the formation and development of franchise policies through group discussions of all phases of the operations including the now objected to restrictions on resale prices, wholesale sales, and sale of shock absorbers and other allied automobile parts. Each advertised extensively along with defendants, extolling the advantages for the consuming public of all aspects of the specialized Midas program. Aware of the restrictions in the program, plaintiffs for three and a half years sought and obtained more and more Midas franchises. Each profited substantially from the program with its restrictions. Not until plaintiffs became dissatisfied with sharing with defendants the expense of replacing mufflers under the guarantee, and a Midas competitor offered them even larger exclusive territories, did the plaintiffs terminate their connection with the alleged illegal program. All elements of *in pari delicto* are thus present and the defense should be applied.

None of the exceptions to the doctrine is applicable. There is no coercion here. In *Simpson* and in other cases relied upon by the petitioners, the dealer plaintiff had no alternative but to deal with defendants if he wished to stay in business. The defendants there were giants in the industry involved who had unilaterally and against the dealers' expressed desires terminated the distribution arrangement between them. Here, the defendant was a relatively small company, and it was the plaintiffs who cancelled their contracts with the defendants and continued on in the same business at the same locations under a new trademark supplied by defendants' competitor.

Application of the *in pari delicto* doctrine here accords with the policy of the antitrust laws. It prevents wrongdoers from benefiting from the consequences of their own illegal acts when they have been injured, if at all, from such acts rather than from just the acts of the defendants. Allowing recovery here would encourage violations of the antitrust laws by providing an incentive to those who would profit from their own violations. Section 4 of the Clayton Act was designed to assist the injured, not to protect the joint venturer in an alleged illegal agreement or to permit a persistent participant to obtain the benefits of treble damages.

II. The issue of the reasonableness of the Midas contractual arrangements was not ruled upon by either court below since the *in pari delicto* defense applied even if the program were ruled illegal and for that same reason the merits of the arrangement are not in issue here.

A. Nevertheless, the franchise provisions were reasonable and necessary, as a matter of law, to assure the American motorist that he would find the products and services which the plaintiffs' advertising of "Midas" represented would be obtained at a "Midas Muffler Shop".

B. Defendants did not possess "sufficient economic power" to "appreciably restrain free competition in the market" and to the extent that plaintiffs were required to purchase from defendants all exhaust system parts sold in a "Midas Muffler Shop" (all of which were covered by the registered trade or service marks of the defendants), it was a reasonable method of doing business being used "by a small company in an attempt to break into the market." *White Motor Co.* v. *United States*, 372 U.S. 253, 262-63 (1963).

C. The change in allocating the expense of the returned mufflers under the Midas guarantee so that the dealer and the defendants shared such expense equally did not consti-

tute an antitrust or other violation of law. Plaintiffs' "reappraisal" of their part in the Midas program as a result of this change in January 1959 demonstrates conclusively their complete participation in, and acceptance of the benefits of, the alleged illegal program prior to that date.

D. To the extent that defendants' good faith and intent to obey the law may be relevant, the initial franchise agreements were not illegal *per se,* and their terms and conditions have been changed as the program grew and as the subsequent decisions of this Court construed the applicable law. The current franchise reflects such changes and is reasonable in all respects.

III. It is undisputed that the defendant corporations were owned and controlled by Nathan and Gordon Sherman, individual defendants, as the means by which they carried on their automobile parts business and that all of the individual defendants acted only in their normal employment capacities. Only one operating corporation precluded any holding out of defendants as competitors or as separate and divorced. Accordingly there was no conspiracy or combination or agreement or contract among the defendants in violation of Section 1 of the Sherman Act. The complaint contains no allegation of a "combination or contract" among the plaintiffs or other Midas franchisees and the defendants so that this issue, never raised in the trial court, is not before this Court.

IV. Since plaintiffs failed to contradict the defendants' Affidavit and the defendants' Appendix of plaintiffs' testimony in depositions and answers to interrogatories which had been presented to the district court in support of defendants' motion for summary judgment, there was no genuine issue as to any material fact. All the facts required for decision were before the district court and the complaint was properly dismissed.

ARGUMENT

I. COUNTS ONE AND TWO WERE PROPERLY DISMISSED ON GROUNDS OF IN PARI DELICTO

Counts One and Two of the Complaint alleged that the Midas franchise agreements created an illegal system of distribution in restraint of trade.[13] The motion for summary judgment on these two counts *assumed*, for purposes of the motion, that this system of distribution may have been illegal in the respects alleged. The undisputed facts in the record, however, uncontroverted by any affidavit of plaintiffs, showed, and both the district court and the court of appeals properly found, that each plaintiff had voluntarily joined with defendants in the initiation of this franchise program, and then participated in, fostered, and profited from that very same allegedly illegal system of distribution. Both courts correctly concluded that plaintiffs were therefore barred under the doctrine of *in pari delicto* from recovering any damages alleged to have been suffered by participation in such illegal practices.

The doctrine of *in pari delicto* is firmly embedded in the law, has been consistently applied by this Court and by the lower federal courts, on proper facts, in private antitrust actions as well as other types of actions, and is clearly applicable to the facts of this case.

A. Historical Bases of the Doctrine

The doctrine is based upon the Latin maxim, *"in pari delicto portior est conditio defendentis,"* which literally

[13]As the court of appeals found, no claim was made by plaintiffs that any restriction was imposed other than those contained in the franchise agreement (A 207).

means, "In a case of equal fault the condition of the defendant is the better one." Black, Law Dictionary (4th ed.), p. 898. Lord Mansfield summed up the principle by stating:

> "If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." *Holman* v. *Johnson*, 1 Cowp. 341, 343 (Trinity Term 1775).

See also I Story, *Equity Jurisprudence* (4th ed.) §298, p. 317; Chitty, *Contracts* (1826) p. 579; Pomeroy, *Equity Jurisprudence* (4th ed.) §402 (1918).

The doctrine was given effect by this Court and by the lower federal courts from earliest times in varying contexts, where the defense of some type of illegality was interposed.[14] This Court recognized that:

> "The defense is allowed, not for the sake of the defendant, but of law itself. . . . It will not enforce what is forbidden . . . Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. . . . [T]he law will not lend its support to a claim founded upon its violation." *Coppell* v. *Hall*, 74 U.S. 542, 558-59 (1868).

In particular, *in pari delicto* was upheld where the claimed illegality was a restraint of trade or other viola-

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[14] *Hannay* v. *Eve*, 3 Cranch 242, 248 (1806); *Coppell* v. *Hall*, 74 U.S. 542, 558-59 (1868); *Randall* v. *Howard*, 67 U.S. 585, 588 (1862); *Tool Co.* v. *Norris*, 69 U.S. 45, 56 (1864); *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 268 (1880); *Hanauer* v. *Doane*, 79 U.S. 342, 347-48 (1870); *Gibbs* v. *Baltimore Gas Co.*, 130 U.S. 396, 412 (1889); *McMullen* v. *Hoffman*, 174 U.S. 639, 654-59 (1899); *Weil* v. *Neary*, 278 U.S. 160, 173-74 (1929).

tion of the antitrust laws. These cases fall into two broad categories — those dealing with enforcement or rescission of contracts, and those involving actions for treble damages.

1. Contract Cases

In the contract cases, the doctrine has become so familiar that it hardly requires citation. Very early this Court refused to aid a plaintiff in enforcement of a contract which was in restraint of trade. *Gibbs* v. *Baltimore Gas Co.,* 130 U.S. 396, 406, 412 (1889); *McMullen* v. *Hoffman,* 174 U.S. 639 (1899). In the latter case, this Court explained its rationale:

> "The court refuses to enforce such a contract and it permits the defendant to set up its illegality, not out of any regard for the defendant . . . but only on account of the public interest . . . . The more plainly parties understand that when they enter into [such contracts they are] . . . themselves outside the protection of the law . . . the less inclined will they be to enter into them. In that way the public secures the benefit of rigid adherence to the law." 174 U.S. at 669-70.

The defense was continuously recognized in subsequent cases, subject to the condition that the illegality must be directly related to the enforcement sought and not merely collateral thereto. *Connolly* v. *Union Sewer Pipe Co.,* 184 U.S. 540, 549 (1902); *Cincinnati Packet Co.* v. *Bay,* 200 U.S. 179, 184-85 (1906); *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U.S. 227, 257-65 (1909); *Wilder Mfg. Co.* v. *Corn Products Co.,* 236 U.S. 165, 172-75 (1915); *A. B. Small Co.* v. *Lamborn & Co.,* 267 U.S. 248, 252 (1925). The principle has been reiterated as recently as *Bruce's Juices, Inc.* v. *American Can Co.,* 330 U.S. 743, 754-56 (1947), and *Kelly* v. *Kosuga,* 358 U.S. 516, 518-19 (1959).

Harriman v. *Northern Securities Co.*, 197 U.S. 244 (1905) was a contract case involving an attempt by a participant in a violation of the antitrust laws to be relieved of the past consequences of his acts rather than an attempt to enforce the contract. Harriman and others had conveyed stock of Northern Pacific Railway to a holding company in a transaction ultimately found to violate the Sherman Act. Harriman thereafter sued to rescind the conveyance and recover the stock. Relief was denied on the ground of the:

> "settled rule that property delivered under an illegal contract cannot be recovered back by any party in pari delicto." 197 U.S. at 295.

The Court would not permit one who joined in an illegal scheme to later renege and get back his contributions to the scheme even though the defendant would have been stripped of its ill-gotten benefit and the court would not have been involved in enforcing an illegal bargain. The rationale of the decision was necessarily that the Court would not disturb the condition in which the parties found themselves where that condition had resulted from performance of illegal acts in which both had participated.

2. Treble Damage Cases

Finally, this Court and the lower federal courts have on similar reasoning applied the doctrine of *in pari delicto* to bar recovery in actions brought to recover treble damages under the antitrust laws.

The earliest such case was *Bishop* v. *American Preservers Co.*, 105 Fed. 845 (N.D. Ill. 1900). Plaintiff combined with others to form a trust of preserve businesses in violation of the Sherman Act. Later he claimed to have been damaged thereby and sued for treble damages. As one ground

for denial of relief, the court stated that "plaintiff was himself a party to the unlawful combination, and was injured by reason of his illegal connection therewith." 105 Fed. at 846.

At the time of the enactment of the Clayton Act in 1914, which extended the rights of private plaintiffs to include injunctive relief as well as the monetary damages which had been provided by the Sherman Act, both the *Bishop* case and *Harriman* v. *Northern Securities Co.*, 197 U.S. 244 (1905) had been decided.

In *Bluefields Steamship Co.* v. *United Fruit Co.*, 243 Fed. 1 (3d Cir. 1917), *dismissed on stipulation*, 248 U.S. 595 (1919), a majority of the stockholders of one company sold their stock to a competitor in order to eliminate competition between them, and certain contracts were entered into to implement this purpose. Subsequently, the first company sued for treble damages, claiming it would have been better off if it had continued to compete with the second company. Relief was denied. The court stated:

> "The plaintiff's claim was in effect that it did not reap all the profits which the combination should have yielded because of the manner in which the defendant exercised its control and conducted the plaintiff's business." 243 Fed. at 14.

And concluded:

> "If, upon evidence which we think abundantly sufficient, the jury found that *all* the stockholders of the Bluefields Company *joined in forming* the alleged unlawful combination and in placing their company in it; *acquiesced* for a long term of years *in the part* their company *played in that combination* and in the manner it played it or was caused to play it; *and accepted and enjoyed the profits* which sprang *from it*, we are of opinion that *the corporation* itself was bound

by their acts and *was precluded from asserting a right of action based upon them*" 243 Fed. at 18.[15]

Shortly thereafter, the Second Circuit decided *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694 (2d Cir. 1921), a case which closely parallels the instant case. The plaintiff was a distributor of photographic products purchased from Kodak. Kodak's distribution system involved various restrictions, including resale price fixing, restrictions on sales of goods to persons other than approved dealers, and prohibitions against carrying competing products. The court found that "plaintiff agreed actively to participate in and took the advantages of defendant's restrictive sales system and of the contracts and agreements in furtherance thereof" 277 Fed. at 696, even though plaintiff from time to time had been suspended by Kodak for failure to comply with the restrictive conditions and had been in each instance reinstated only after promising to adhere to the conditions. After Kodak's distribution system was declared illegal in a government suit, the dealer sued for treble damages, claiming to have been injured by the restrictions. A jury verdict for the dealer was reversed and the complaint was ordered dismissed. The court held that plaintiff was "*in pari delicto*" and stated:

> "[P]laintiff acquiesced and actively participated in defendant's so-called restrictive sales system. . . . During this period he gained such advantages as accrued from the price-fixing system and from the exclusion of those dealers, who, unlike plaintiff, would not accede to this method of doing business.
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> "The proposition of plaintiff, in effect, is that, while he joined with defendant in the illegal method of do-

[15] The same result was reached on similar facts in *Tilden* v. *Quaker Oats Co.,* 1 F.2d 160, 166 (7th Cir. 1924).

ing business after 1908 *and took such advantages as sprang therefrom,* he may nevertheless recover damages caused, as he claims, during the period when he and defendant were both wrongdoers. With this proposition we are unable to agree. 277 Fed. at 697, 698.

In 1927, this Court recognized the existence of the *in pari delicto* doctrine in treble damage cases in *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 377 (1927) . A photographic dealer alleged that Kodak had fixed resale prices, prohibited carrying of competitive goods, and after attempting unsuccessfully to purchase plaintiff's business had refused to sell it any further goods at dealer discounts. The dealer sued for damages flowing from the termination; and obtained a verdict. The district court had instructed the jury that if the plaintiff:

> "had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto,* and hence could not recover any damages whatever on account of the defendant's refusal to continue to sell it goods." 273 U.S. at 377.

This Court approved these instructions although it affirmed the verdict for plaintiff.

In *Northwestern Oil Co.* v. *Socony Vacuum Oil Co.,* 138 F.2d 967 (7th Cir. 1943), *cert. denied,* 321 U.S. 792 (1944), plaintiff, a gasoline jobber, sought treble damages on account of a price-fixing conspiracy which had raised the price it paid for gasoline. The court of appeals held that denial of relief would have been justified on the basis of *in pari delicto* because the proof showed that plaintiff's officers had knowingly participated and cooperated in

formulating the plan and had instructed plaintiff's employees to cooperate in promoting the plan.

> "Having participated in this illegal undertaking, plaintiff may not recover; where parties stand in pari delicto, the law leaves them where it finds them." 138 F.2d at 971.

Likewise, several district courts followed *Blackmore* and applied the doctrine of *in pari delicto* to bar relief in treble damage cases, e.g., *Morny* v. *Western Union Telegraph Co.,* 40 F. Supp. 193, 200-201 (S.D. N.Y. 1940); *Mid-West Theatres Co.* v. *Cooperative Theatres,* 43 F. Supp. 216, 224 (E.D. Mich. 1941).

It can be seen that all the foregoing cases applying *in pari delicto* involve substantially the following fact pattern, which, as is shown later, is also present in the instant case:

—The plaintiff and the defendant voluntarily entered into an agreement or arrangement in illegal restraint of trade hoping and expecting to benefit and profit thereby.

—The plaintiff thereafter fostered and participated in the arrangement and did in fact benefit and profit by operating under the agreement for a period of time.

—The plaintiff subsequently became disappointed with the benefit obtained, had a falling out with the defendant and concluded that he would have profited more if he had operated free of the restrictive agreement and thereupon brought a suit for treble damages based on the illegal arrangement.

There are at least three reasons which compel a refusal of damages under such circumstances:

1. Refusing relief tends to discourage the performance of such illegal acts,

2. It is abhorrent to a court to lend its aid to relieve a wrongdoer from the direct consequences of his own illegal acts or to permit him to reap the benefits of those acts and then later claim an additional bonus of treble damages, and

3. Any damage to the plaintiff from the illegal arrangement results as much from plaintiff's own participation as from defendant's participation therein; thus it cannot be said that the defendant's acts are the sole or proximate cause of plaintiff's damage.

B. Recent Development of the Law

1. Judicial Rejection of the "Unclean Hands" Defense Has Not Impaired the In Pari Delicto Defense in Antitrust Cases

Petitioners contend (P.B. 26-37) that a line of cases decided by this Court, starting with *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211 (1951), and ending with *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), have abolished *in pari delicto* as a defense in private antitrust actions. The cases do not so hold.

Kiefer-Stewart Co. v. *Seagram & Sons,* 340 U.S. 211 (1951), was a suit by a liquor wholesaler who was cut off by Calvert and Seagram for failure to adhere to maximum resale prices. A jury verdict for plaintiff was reversed by the court of appeals on the ground that defendant had committed no illegal acts. This Court held the practice illegal and reversed and reinstated the verdict. The defendants sought to sustain the decision on a ground not passed on by the court of appeals, namely, that plaintiff had entered into a horizontal conspiracy with other wholesalers to fix minimum prices. This alleged conspiracy

among wholesalers to fix minimum prices was entirely separate from and unrelated to the price-fixing scheme among the distillers to fix maximum prices, and thus the defense was that of "unclean hands" rather than *in pari delicto*. This Court refused to allow this unclean hands defense.

There was good reason to do so. By granting relief, the Court was not lending its aid to relieve a wrongdoer of the direct consequences of his own illegal acts; the defendants' acts were plainly the proximate and sole cause of plaintiff's damage. In addition, the validity of the defense would have to be determined, in effect, by trying a separate lawsuit as to whether plaintiff was actually engaged in a violation unrelated to the subject matter of the litigation. See "Unclean Hands, the Effect of Antitrust Violations on Antitrust Actions," 113 U. of Pa. L.R. 1071; 1082 (1965).

None of these considerations would have applied had the plaintiff been *in pari delicto* with the defendants. This Court did not mention *in pari delicto* and in refusing the defense of unclean hands, it in no way purported to affect the established doctrine, nor would there have been any reason for it to do so.

The second case, *Moore* v. *Mead Service Co.*, 340 U.S. 944 (1951), also involved the defense of unclean hands. Plaintiff, a local baker, exacted a promise from substantially all his customers to buy only from him. Thereupon, a competing interstate bakery firm made a large price reduction in plaintiff's area while maintaining higher prices elsewhere. It is to be noted that even though defendant's illegal acts were committed *in retaliation* for plaintiff's illegal acts, the two schemes were separate and distinct; plaintiff was not a participant in and had not sought to

benefit from the price discrimination of which he complained. The court of appeals held plaintiff to be barred from recovery for the price discrimination, 184 F.2d 338 (10th Cir. 1950). This Court granted certiorari and summarily vacated the judgment per curiam with directions to reconsider the case in light of *Kiefer-Stewart*. Again, the decision had no effect on the law of *in pari delicto*.[16]

The obvious distinction between the defense of "unclean hands" and *in pari delicto* was clearly understood two years later in *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric, Light & Power Co.*, 209 F.2d 131 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954), as it was in the court below. In that case two utilities had entered into a contract in 1931 by which each had agreed to certain restrictions on its activities, and the parties had operated thereunder until 1948. In that year, Penn Water, which wished to make a prohibited extension of its plant, sought to repudiate the agreement and sued for a declaratory judgment that it was an illegal

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[16]Another case cited by petitioners, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948), (PB 37) decided prior to *Kiefer-Stewart*, did not deal at all with questions of *in pari delicto* or unclean hands. The court of appeals in a brief per curiam opinion confined its consideration to the single issue of interstate commerce and specifically disclaimed any consideration of or expression upon questions of *in pari delicto*, 159 F.2d 71, 72 (9th Cir. 1947). This Court likewise confined its consideration exclusively to the interstate commerce issue. In any event the plaintiff in that case, a sugar-beet grower, complained of a horizontal price-fixing agreement among his refiner customers by which he was compelled to enter into an unfavorable contract with one of the refiners. Assuming the latter contract to have been illegal, it was a different matter than the horizontal conspiracy of which he complained, and in any event it was clear that plaintiff was coerced into entering the contract by the illegal combination among the refiners.

restraint of trade. After two-and-a-half years of litigation, the contract was finally declared illegal and invalid. Penn Water then sued for damages it had suffered from the two-and-a-half year delay in being able to make the desired plant extension. Relief was denied and the Fourth Circuit affirmed on the ground that Penn Water was a party to the illegal agreement and therefore *in pari delicto.* Regarding the argument that the doctrine of *in pari delicto* had been overruled by *Kiefer-Stewart, Mandeville* and *Moore,* the court stated:

> "We do not so understand these decisions, for in none of them were the plaintiff and the defendant parties to the same illegal conspiracy or agreement on which the suit was based.
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> * * *
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> "We are satisfied that it was not the intention of the Supreme Court to overrule the doctrine firmly established in earlier cases" 209 F.2d at 133, 134.

No case decided by this Court has ever held otherwise. In fact, research has disclosed no subsequent case in which this Court has dealt with the doctrine of *in pari delicto.* The lower federal courts, however, have continued regularly to apply and define the doctrine.

For example, in *Lehmann Trading Corp.* v. *J & H Stolow, Inc.,* 184 F.Supp. 21, 22 (S.D.N.Y. 1960), the court denied a motion to strike the defense that "plaintiffs have participated to such an extent in the activities complained of and have so enjoyed the benefits thereof, and have themselves so violated the antitrust laws, as to be disentitled from maintaining any of the alleged rights of action set forth in the Complaint." The court distinguished sharply between cases where the plaintiffs participated beneficially in the very illegal acts complained of and cases where they

have merely engaged in other illegal acts, and held that in the former type of case, *in pari delicto* remains a defense.

The *in pari delicto* defense was similarly upheld and distinguished from the unclean hands defense in *H. & A. Selmer, Inc.* v. *Musical Instrument Exchange, Inc.*, 154 F. Supp. 697, 698-99 (S.D.N.Y. 1957) (alleged illegal franchise agreement). See also *New York Credit Men's Adj. Bureau* v. *Bruno-New York, Inc.*, 120 F. Supp. 495, 498 (S.D.N.Y. 1954). The defense was also applied in *Kershaw* v. *Kershaw Mfg. Co.*, 209 F.Supp. 447, 454 (M.D. Ala. 1962) *aff'd*, 327 F.2d 1002 (5th Cir. 1964) (contract for development of invention); *Louisiana Petroleum Retail Dealers, Inc.* v. *The Texas Company*, 148 F.Supp. 334, 337 (W.D. La. 1956) (price fixing); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896, 900 (7th Cir. 1966) (franchise agreements prohibiting purchase of competing products); see also *Florists' Nationwide Telephone Delivery Network* v. *Florists' Telegraph Delivery Association*, 371 F.2d 263, 267-68 (7th Cir. 1967), *cert. denied*, 387 U.S. 909 (1967) (group boycott).

At the same time, the lower courts, following *Kiefer-Stewart* and *Moore*, have properly refused to allow the defense of unclean hands. E.g., *Trebuhs Realty Co.* v. *News Syndicate Co.*, 107 F.Supp. 595, 597 (S.D.N.Y. 1952) (plaintiffs' alleged monopolization of play booking no defense to defendants' discrimination against plaintiffs in newspaper advertising rates); *Interborough News Co.* v. *Curtis Publishing Co.*, 108 F.Supp. 768, 770 (S.D.N.Y. 1952) (plaintiffs' alleged monopolization of wholesale distribution of magazines no defense to collective boycott of plaintiff by defendant publishers); and *Waldron* v. *British Petroleum Co.*, 231 F.Supp. 72, 92 (S.D.N.Y. 1964) (plaintiff's corrupt and illegal means used to obtain contract no

defense to defendant's antitrust violations injuring plaintiff's contractual rights). In the *Waldron* case, the court referred to cases such as *Penn Water* and *Lehmann Trading* and noted that the defense of *in pari delicto* remains available in such cases where the plaintiff is a party to the illegal acts complained of.

2. Exceptions to the In Pari Delicto Defense

The only situations in which the lower courts have found the defense inapplicable are those in which (a) the plaintiff's participation resulted from coercion, or to phrase it another way, he was a "victim" rather than a "participant", or (b) the plaintiff had completely and effectively withdrawn from the illegal arrangement and damages were claimed only for the period subsequent to such withdrawal, or (c) the plaintiff requested only injunctive relief against executory features of the agreement.

a. Coercion

The "coercion" class of case is exemplified by *Jewel Tea Co.* v. *Local Unions, etc.,* 274 F.2d 217, 223 (7th Cir.), *cert. denied,* 362 U.S. 936 (1960), where plaintiff had been compelled to agree to an illegal agreement with the labor unions to prevent the sale of meat after certain hours in the Chicago area under the threat of a costly strike. The defense was also recognized though not applied in *Allgair* v. *Glenmore Distilleries Co.,* 91 F. Supp. 93, 95 (S.D.N.Y. 1950), where a trial was required to determine whether plaintiff paid illegal brokerage under economic duress or compulsion and in *Ring* v. *Spina,* 148 F.2d 647, 653 (2d Cir. 1945), where the plaintiff was coerced into becoming a participant in an illegal restrictive scheme fostered by the Author's League of America and where the court said, "where the parties stand actually and truly *in pari delicto,* the law should leave them where it

finds them." Coercion may also arise from disparity in size and thus of bargaining power between the parties or from other circumstances where the plaintiff has no alternative but to deal with the defendant if he wants to be in business, *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 467-69 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Bales* v. *Kansas City Star Co.*, 336 F.2d 439, 441-42 (8th Cir. 1964). See also *Gaines* v. *Carrollton Tobacco Board of Trade*, 386 F.2d 757, 759 (6th Cir. 1967).

Closely related to coercion is the notion of "victim" v. "participant". Where the plaintiffs enter the illegal arrangement not in the hope or expectation of gaining any benefit therefrom, or where the only discernible benefit flows exclusively to the defendant, some courts have characterized this situation by saying that the plaintiff is a "victim" rather than a "participant". Such cases include *Ring* v. *Spina*, 148 F.2d 647, 653 (2d Cir. 1945); *Enterprise Industries, Inc.* v. *Texas Co.*, 136 F.Supp. 420, 423 (D.Conn. 1955) *rev'd. on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) (plaintiff the victim of discriminatorily high prices); and *Red Rock Bottlers, Inc.* v. *Red Rock Cola Co.*, 1952 CCH Trade Cases ¶67,375 (N.D. Ga. 1952) (restrictive arrangement was for sole benefit of defendant and plaintiff gained no benefit therefrom).

b. Withdrawal or Purging

The lower courts have also found the *in pari delicto* defense inapplicable where the plaintiff had completely and effectively withdrawn from the illegal arrangement and damages were claimed only for the period after such withdrawal. This class of cases is exemplified by *Victor Talking Machine Co.* v. *Kemeny*, 271 Fed. 810, 816 (3rd Cir. 1921), and *Connecticut Importing Co.* v. *Frankfort Distilleries, Inc.*, 101 F.2d 79, 81 (2d Cir. 1939).

c. *Nature of Relief Sought*

Finally, the lower courts have found the *in pari delicto* defense inapplicable where plaintiff was seeking only an injunction to restrain enforcement of the illegal agreement in the future. *E.g., United Cigar-Whelan Stores Corp.* v. *H. Weinreich Co.,* 107 F.Supp. 89, 92-93 (S.D.N.Y. 1952), *The Gray Line, Inc.* v. *Gray Line Sightseeing Companies Associated, Inc.,* 246 F.Supp. 495, 500-01 (N.D. Cal. 1965). *Cf. National Transformer Corp.* v. *France Mfg. Co.,* 215 F.2d 343, 361 (6th Cir. 1954). Obviously, where the plaintiff repudiates and withdraws from participation in an illegal agreement and seeks merely to prevent its continuance, there is no reason in policy or law why such relief should not be granted.

3. Simpson v. Union Oil Co. and Later Cases

Petitioners, however, contend that *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), has abolished the defense of *in pari delicto* in antitrust cases. That is simply not so. The question of *in pari delicto* was not involved in *Simpson* and was not considered or passed upon either by the lower courts or by this Court.

Simpson had leased a service station from Union and had simultaneously been required to execute a "Retail Dealer Consignment Agreement" for purchase of gasoline from Union, under which Simpson was obligated to sell gasoline at prices fixed by Union. The consignment agreement automatically terminated upon termination of the lease. Upon expiration of the lease, Union refused to renew it because of Simpson's failure to adhere to the retail prices prescribed by Union. Simpson thereupon sued for profits lost during the lease term by virtue of inability to charge competitive prices, and for damages resulting from the

termination of Simpson's dealership. The district court granted summary judgment in favor of Union.

The Court of Appeals for the Ninth Circuit affirmed. 311 F.2d 764 (9th Cir. 1963). It assumed that Union's practices were illegal and confined itself entirely to the question of whether Simpson had suffered actionable damage. It concluded he had not because of the doctrine of *consent*. The court rationalized the matter thusly:

> "Simpson knew that by obtaining the lease he would also have to sign the consignment agreement. He had not previously been a lessee. He had freedom of choice to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.
>
> * * *
>
> "The law does not permit an individual to see and observe a tort violation and then to voluntarily put himself in a position where a tort cause of action would accrue and because of which he might become a litigant.
> "The Restatement on Torts, Sec. 892 states,
>
> > 'A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct.' " 311 F.2d at 768.

The defense of *in pari delicto* was nowhere mentioned in the court's opinion and was simply not involved in the case. No contention had been made that Simpson had committed any illegal acts, or that he had sought to obtain or had obtained benefits from active participation in an illegal agreement. The sole point made was that because Simpson had merely *consented* to the imposition of the illegal restraint upon him, he had suffered no actionable wrong.

This Court reversed and remanded 377 U.S. 13 (1964). It "disagree[d] with the Court of Appeals that there

is no actionable wrong or damages," 377 U.S. at 16, held that there was a coercive agreement to achieve resale price maintenance, 377 U. S. at 17, and that "the fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws" 377 U.S. at 16.

This Court thus understood that the court of appeals' decision was based solely on the doctrine of "consent," and this Court understandably held that doctrine was not a defense to the action since it has been held to be against public policy to allow advance waivers of causes of action for future antitrust violation. *Fox Midwest Theatres* v. *Means,* 221 F.2d 173, 179-80 (8th Cir. 1955); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.,* 39 F. Supp. 117, 119 (S.D.N.Y. 1941). Accord: *Gaines* v. *Carrollton Tobacco Board of Trade,* 386 F.2d 757, 759 (6th Cir. 1967).

But this Court's decision, limited to the question of consent, had nothing to do with the defense of *in pari delicto.* The two doctrines are separate and distinct. See "In Pari Delicto and Consent as Defenses in Private Antitrust Suits," 78 Harv. L.Rev. 1241, 1244, 1246-48 (1965). The term *"in pari delicto"* is not even mentioned in the Court's opinion or in any of the separate opinions. In none of the briefs was it contended that Simpson had committed any unlawful acts, or that he had sought or obtained any benefits from active participation in an illegal agreement. He was only alleged to have passively "consented" to an illegal restraint. The *Simpson* case, therefore, in no way disturbed the settled law of *in pari delicto.*

Nor has the doctrine been disturbed by any of the other cases cited by petitioners, such as *United States* v. *Arnold,*

Schwinn & Co., 388 U.S. 365 (1967), *Goodyear Tire and Rubber Co.* v. *F.T.C.*, 331 F.2d 394 (7th Cir. 1964), *F.T.C.* v. *Brown Shoe Co.*, 384 U.S. 316 (1966), or *Sun Oil Company* v. *F.T.C.*, 350 F.2d 624 (7th Cir. 1965), which were all government cases and therefore obviously could not have involved questions of defenses to a private action, or *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); second opinion, 324 F.2d 566 (4th Cir. 1963), which involved neither consent nor *in pari delicto*, since the dealer had never voluntarily signed or entered into any agreement regarding the restrictions sought to be imposed.

It is therefore clear that *in pari delicto* has continuously remained a valid defense in antitrust cases, and remains to be given effect in a proper case.

C. The Defense Is Clearly Applicable On The Facts Of This Case

1. All Elements Of The Defense Are Present

Petitioners complain of the Midas franchise system of distribution as violative of the antitrust laws. That system must be viewed as a whole and in its entire context, not in separate, unrelated pieces as petitioners would have this Court do.

As set forth in the Statement, *supra*, pp. 7-13, prior to the Midas concept, automotive exhaust parts were sold by conventional methods of distribution. Three plaintiffs, Pierce, Ross and Skarupa, had been purchasing such parts from International Parts under the old system free of any alleged restraints. They voluntarily embraced the new Midas franchise system of distribution which included, among other things, the creation of a new "image" for

sales and installation of exhaust parts under the trade marks and service marks "Midas" and "Midas Muffler Shops," the formation of a nationwide network of franchised shops operating under that image and supported by extensive national advertising, and promotion of a unique nationwide guarantee.

It has been admitted, solely for purposes of the motion for summary judgment, that this system of distribution carried with it certain restraints. Each franchisee was initially assigned an exclusive territory, and Midas agreed not to franchise any other party within that territory. As a corollary, no franchisee was to operate outside his exclusive territory. In order to avoid any conflict with the national image sought to be created, they agreed to sell only to consumers and that all franchisees would maintain uniform resale prices, and that they would stock only genuine Midas products (A36-45).

Each of the plaintiffs had a vital stake in the maintenance and growth of this system, including the alleged restraints which were an integral part thereof. Plaintiffs helped formulate the program and were among the very first franchisees in the newly conceived program. From the beginning they sought to suppress competition and create for themselves a monopoly in their respective areas. Pierce went into the program "so as not to invite competition;" Skarupa wanted to appropriate exclusively the entire Washington, D.C. metropolitan area and attempted to exclude the entry of any other franchisee therein; Ross sought the same with respect to the entire State of Michigan; and Wheeler actually terminated when Midas franchised another dealer in his area, offering to return only if the proposed competition were eliminated (Statement, *supra*, pp. 8, 14, 15, 16-17, 20-21).

The restrictions on resale allegedly imposed against plaintiffs were merely the corollary of the exclusivity they desired. The system could work only if each franchisee respected the territory and customers of each other franchisee. If the system called for keeping others out of their territories, it correspondingly required keeping them out of the territories of others.

The benefit of resale price maintenance also flowed to plaintiffs. Without competition in large expanses of territory, they were free to maintain higher prices. But since Midas was nationally advertised, and since the Midas guarantee was good at any Midas Muffler Shop in the country, plaintiffs could protect their price shelter only by a system whereby all other franchisees agreed to maintain the same prices.

And because of their commitment to a system which through national advertising held out to the public a network of automotive exhaust system *specialists*, it was essential to plaintiffs that no single member of that system destroy the concept or the image by carrying products or operating in a manner incompatible with it. A motorist from Washington who, while visiting another city, had dealt with a Midas shop there operated like an alley mechanic's garage, would not be likely again to patronize a Midas shop in Washington.

Each of the plaintiffs actively sought to protect his stake in the maintenance and growth of the franchise system, including its alleged restraints. As detailed in the Statement, *supra*, pp. 15, 16-17, 20-21, each vigorously re-

sisted any attempt to encroach upon the exclusive territory he sought to protect. Each sat on the National Advisory Council of Midas dealers, participating in and voting upon the formulation of franchise policies. Included among the topics discussed and acted upon at these meetings were resale price maintenance, restrictions on sales to wholesale customers, restrictions on sale of shock absorbers, springs, and other allied automobile parts, and revisions of franchise agreements in regard to territory. Some of the plaintiffs contributed articles to the "Dealer Dabbler", circulated among all Midas franchisees, and some were active in recruiting new franchisees into the program. Each spent substantial sums on advertising the Midas image and concept inherent in the franchise system of distribution.[17]

Of extreme significance is the fact that plaintiffs eagerly continued to seek and obtain additional Midas franchises for periods of up to three and a half years after their initial franchises.[18] There is not a shred of evidence that any plaintiff ever sought to have any of the now complained of restrictive provisions deleted from these additional franchises. On the contrary, they vigorously resisted defendants' attempts to delete the provisions regarding exclusive territories.

Only after plaintiffs became disgruntled with the reduction in guarantee credit and were offered an opportunity

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[17] See Statement, *supra*, pp. 9-11, 18 and Argument, *infra*, note 25, p. 61.

[18] Paragraph 22(M) of the complaint (A 25) alleged that defendants "consistently denied" plaintiffs' repeated requests for additional franchises.

by a competing franchise program to gain exclusive rights in even larger territories did they exercise their ever-present right to unilaterally terminate their Midas franchises.

In sum, each of the essential elements of the *in pari delicto* defense which we have set forth at page 36, *supra*, was established on the undisputed facts in this record:

1. *Plaintiffs and defendants voluntarily entered into allegedly illegal franchise arrangements hoping and expecting to profit thereby.* If—as was admitted solely for purposes of the motion for summary judgment—the Midas franchise system was illegal, then plaintiffs, having voluntarily entered therein in hopes of benefitting from that illegality, were equally guilty thereof.[19]

2. *Plaintiffs helped to formulate, fostered and participated in the program, and did in fact benefit and profit by operating under the agreements for their entire duration.* We have shown above that plaintiffs had an active stake in the franchise system and agreements, including the restraints included as an integral part thereof. They did not passively "submit" or merely "consent" to these provisions; they sought personal benefit and profit therefrom as active participants in and proponents of the

[19] Petitioners' Argument (PB 35-36) that even if they are *in pari delicto* under Section 1 of the Sherman Act, they could not be *in pari delicto* insofar as Section 3 of the Clayton Act is concerned is spurious. It is plaintiffs' active involvement in the totality of the scheme of interrelated and interdependent restraints allegedly comprising the Midas franchise system which places them *in pari delicto*.

system. There can be no doubt that they profited enormously from operation under this system for the entire period of their involvement in it.[20]

3. *Plaintiffs subsequently became disappointed with the amount of profit and benefit obtained, concluded that they would have profited more if they had been able to operate free of the franchise agreements, and thereupon brought a suit for treble damages.* The record clearly shows that after entering, fostering, and enjoying the fruits of the alleged illegal system, plaintiff had a change of heart, impelled principally by the reduction in guarantee credit, the frustration of their desire to monopolize larger territories, and the offer of a competing franchise. They thereupon concluded they would have made even more profit had they operated free of the franchise agreements, and brought this suit for treble damages.

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[20] Skarupa's annual salary of $44,000 for 1958 exceeded his total personal income for all of the six years prior to Midas; he enjoyed personal and corporate profits of $182,763.31 from a personal investment of $9,800 in his four years with Midas (A 83). Ross more than doubled his 1955-56 fiscal year earnings in his first full year and took home over $154,000 in profits during his Midas years (A 90-91). Pierce's coterie of corporations and enterprises made it difficult to ascertain his personal profits from Midas, but he has never denied the $180,000 attributed to him for his three and a half Midas years (A 97-98). Wheeler's wages of $6,000 in 1955 became $29,000 as a Midas operator in 1957; additional corporate income netted him close to $100,000 before he switched to a competitive franchise (A 104).

2. None of the Exceptions to the Doctrine is Applicable

(a) Coercion

There is no evidence in this record that any of the plaintiffs entered their franchise agreements under coercion.[21] Petitioners suggest (PB 7) that there was coercion because Midas refused to enter into franchises on any other terms, and that Pierce was told he would face competition if he did not sign. But no case has ever held that a seller's unilateral offer of terms of sale, leaving the buyer free to accept or reject, amounts to coercion sufficient to vitiate *pari delicto* whether or not the seller states that the same terms will be offered to others if the buyer rejects. And if there could be any doubt about the lack of coercion, it is laid to rest by the eager grasping of each plaintiff for more and more franchises, continuing for many years after the execution of his initial franchise.

To the extent petitioners mean to suggest that even though they were not coerced in entering into the franchise agreements, they were "victims" of and not "participants" in the program, the suggestion cannot be reconciled with the undisputed facts. Under the cases (see pp. 42-43, *supra*), one is considered a "victim" of illegal restraints only when he has nothing to gain from agreeing to them, the sole benefit thereof flowing to the defendant. Such is not the case here. As shown above, each plaintiff helped initiate, had a vital stake in, and sought to benefit from the Midas franchise system, including the restrictive provisions which were an integral part thereof. They sought, fostered, and helped to formulate those very restraints as well as the

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[21] Both courts below found that "coercion" is not "a factor herein" (A 211, 110).

system of which they were a part. They were clearly "participants" and not "victims."

Petitioners further seem to suggest that *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964), has redefined the concept of coercion as an exception to *in pari delicto.* Actually, as explained above, that case did not involve a defense of *in pari delicto* at all, but only the question whether consent was a defense. Since this Court found that consent was not a defense, and since Union never suggested that Simpson had actively engaged in illegal conduct such as to place him *in pari delicto*, the Court had no occasion to consider whether Simpson was coerced into the illegal agreement so as to vitiate any *in pari delicto* defense. The coercion of which the Court spoke was not coercion bringing about the original agreement, but that inherent in the restrictive agreement itself.

It is noteworthy, however, that Simpson *did* allege he had been coerced into entering into the consignment agreement upon pain of being denied a lease of the real estate. Even that coercion could not be implied in this case. When Simpson's agreement was terminated by Union Oil, he also lost his lease and was out of business completely; contrariwise these plaintiffs all continued in business at the same locations (A 81-82, 89-97, 101-103) with a competitive franchise after they terminated Midas and without changing "the physical facilities in any way other than to change the signs and that type of thing" (A 131). Skarupa even advertised, "I'm still doing business at the same old stands" (A 169-70).

Nor is there any "coercion" by virtue of disparities in size and bargaining power. Midas, which introduced its

new and different program in the automotive parts field in 1955 and which by 1959 had total sales of only $9 million and 268 dealers throughout the United States, is not comparable to Union Oil with sales substantially in excess of $347,900,000 and with 3,305 gas stations in just ten states. Plaintiffs' bargaining power here is also demonstrated by their unilateral total cancellation of Midas. Unlike Simpson, Osborn, Lessig and Bales in the plaintiffs' authorities,[22] the Midas dealers were not trying to continue their relationship with a dominant supplier. It was Midas in this case whose chief executive even made a special trip to St. Louis in an unsuccessful effort to keep the dealer, Wheeler, in the program (A 102-103).

(b) Withdrawal

Nor can petitioners take advantage of the cases which hold that an originally voluntary and active participant in an alleged conspiracy may recover damages for such period as he suffered from its restraints *after* he has completely and effectively withdrawn from it. *Victor Talking Machine Co.* v. *Kemeny,* 271 Fed. 810, 816 (3d Cir. 1921); *Connecticut Importing Co.* v. *Frankfort Distilleries, Inc.,* 101 F.2d 79, 81 (2d Cir. 1939). These cases require that plaintiff's withdrawal be total, complete, and effective. A party may not repudiate those provisions of an agreement to which he objects and still seek to enforce those provisions which he finds beneficial. *Cf. Ring* v. *Authors' League of America,* 186 F.2d 637, 643 (2d Cir. 1951). Here, assuming some of the plaintiffs sporadically sought to

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[22] *Simpson* v. *Union Oil Co.,* 377 U.S. at 15; *Osborn* v. *Sinclair Refining Co.,* 286 F.2d at 834; *Lessig* v. *Tidewater Oil Co.,* 327 F.2d at 463; *Bales* v. *Kansas City Star Co.,* 336 F.2d at 441.

ignore certain of the restrictive provisions, none of them ever sought to repudiate the franchise agreements in toto or even all the restrictive provisions theerof. Rather, they sought to continue to enjoy the benefit of such restrictive and other features of the system as suited them and indeed are now claiming damages for not being permitted to obtain more of them (A 49).

3. Application of the In Pari Delicto Doctrine Here Is Consistent with the Policy of the Antitrust Laws

All the reasons which support the doctrine of *in pari delicto* apply with full force to the facts of this case. First, it would be abhorrent to this Court to lend its aid not only to relieve wrongdoers from the consequences brought about by their own deliberate, voluntary, illegal acts, but to reward them threefold therefor. Second, to award damages would ignore the mandate of Section 4 of the Clayton Act that plaintiffs' damage must occur *"by reason of* anything forbidden in the anti-trust laws." Any damage to plaintiffs from the alleged illegal system resulted as much from their own participation therein as from defendants; thus it cannot be said that defendants' acts are the proximate cause of any such damage. Finally, to afford relief to plaintiffs would defeat the very policies of the antitrust laws which they purport to be enforcing, for it would encourage persons to become active participants in illegal schemes, knowing that if the scheme should work out disappointingly, they could recover three times their alleged losses.

Petitioners' professed fear that the decision below will foreclose all franchisees from ever suing their franchisors for antitrust violations is a *reductio ad ab-*

surdum as also are the contentions that the decisions below "constitute a privately created exemption" for all "franchisors" from Section 4 of the Clayton Act (PB 31), "destroy Section 4 as a weapon for enforcement" of the antitrust laws (PB 33) and deny the benefits of the antitrust laws to one of the very classes they were "designed to protect" (PB 35). Where the franchisee is subject to coercion, or merely passively consents to a restrictive scheme in which he has no active or beneficial stake, or if he does not (unlike these plaintiffs) aid in the formation of, participate in, further and profit from the scheme, the defense of *in pari delicto,* of course, will not be applicable.

Section 4 of the Clayton Act enlists ". . . the *sufferer* to aid in enforcement of the statute," *Bruce's Juices, Inc.* v. *American Can Co.,* 330 U.S. 743, 757 (1947). It was not designed to protect a joint venturer in an alleged illegal arrangement or to allow a persistent participant in such an arrangement to reap the windfall of treble damages when his avarice is no longer being satisfied by his active pursuit of the allegedly condemned practice. Private antitrust suits are designed to help deter violations of the antitrust laws. That purpose is better served by denying recovery to those persons taking part in illegal schemes than by permitting them to take more monies from such participation which would in turn be trebled. As stated by the court below:

> "Virtually every dealer, *particularly* plaintiffs enjoyed substantial monetary gains from *participation* in the Midas program. . . . They voluntarily *acceded* to, *fostered* and *profited* from the very practice about which they now complain. . . . It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine." (A 207, 211, 215).

II. THE MERITS OF THE MIDAS FRANCHISE AGREEMENT ARE NOT AT ISSUE HERE

Petitioners argue throughout their Statement of the Case (PB 5-9, 13-14) and in their Argument (PB 19-25) that the restrictions of the Midas franchise agreements were all illegal *per se,* that they resulted in a tying agreement which was also illegal *per se,* and that because of them and the change in procedures so that plaintiffs shared 50% of the cost of the Midas guarantee, plaintiffs were somehow damaged under the antitrust laws and eventually forced to leave the Midas program. Not only are these arguments irrelevant with respect to the question of whether plaintiffs were *in pari delicto,* but they are also untrue factually and unsound legally.

A. The Franchise Agreements

The undisputed facts are that from 1955 to 1959 three forms of Midas franchise agreements were in use, one or more of which was executed by each of the plaintiffs, and which were attached as Exhibit A to the complaint (A 36-45) and as Appendices A and B to the corporate defendants' answer (R 63-68, 69-75). These forms outlined the terms and conditions under which the defendants licensed plaintiffs to use defendants' trademarks and service marks incorporating the word "MIDAS,"[23] the validity of which the plaintiffs and all other franchisees specifically acknowledged (A 38). The provisions of the fran-

[23] The first "Midas" trademark covered "Mufflers for internal combustion engines and parts thereof — namely, tail pipes, exhaust pipes, and muffler clamps" (A 106). The "Midas" service mark was registered for "Inspection of automotive exhaust systems and installation of automotive mufflers and exhause system parts" (A 107).

chise agreement concerning the location from which the dealers sold; the handling, without Seller's consent, of competing goods; the owner's devotion of full time to the business; the purchase of a minimum opening stock of merchandise; and the maintenance of retail prices (set forth at PB 6) were included with some modifications in the three forms of franchise agreement initially used. The fourth form of the franchise agreement in use since February 1960 contains none of these restrictions. This form was identified as plaintiffs' Exhibit No. 1 at the deposition of Gordon Sherman and is reprinted as Appendix B hereof.[24]

In answer to plaintiffs' counsel's specific questions with respect to why the form of franchise was changed in February 1960, Gordon Sherman explained that the new form "reflected our relationship with our customers" and better "described the circumstances of our association" (Sherman Dep. 31-32). The accuracy of Mr. Sherman's characterization is substantiated by the testimony of plaintiff Pierce who continued to sell shocks and springs from most of his locations throughout his time with Midas (Pierce Dep. 98-101, 146-47, 198-200, 318-20). He explained:

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[24] It is difficult to understand how petitioners can now represent to this Court (PB 14) that, as of August 1960, there were 350 Midas franchises containing exclusive dealing and resale price maintenance provisions when on March 20, 1961 plaintiffs were furnished (pursuant to subpoena duces tecum) with the identity of all Midas dealers and the form of franchise agreement under which they operated. Of the 297 identified shops, 275 had the new franchise which contained no such provisions and which specifically canceled the old franchises which did contain them (Appendix B, p. 10, *infra*).

> "I knew it was [prohibited] in the contract and they knew it, but I did not feel it applied to me . . ." (Pierce Dep. 162).

His complete and only discussion with Mr. Gordon Sherman as to pressure on Pierce to drop shocks and springs occurred during the former's visit to Mr. Pierce's places of business as follows:

> "A. . . . I said, 'Gordon, now how about this shock and spring business? I am sitting right on top of a fence, and if this continues, I will have to go one way or the other.'
>
> "He said, 'Joe, I will never tell you not to sell shocks and springs.' And I guess that was just about it, as well as I remember the conversation" (Pierce Dep. 163).

Thus, although plaintiffs did not operate under the current unrestricted Midas franchise form which has been in effect since 1960, their business was conducted in a manner which reflected the provisions of these new agreements rather than those cited in Petitioners' Brief (PB 6).

As to the legality of the 1955-59 franchise provisions, defendants submit that plaintiffs, after signing a franchise and becoming a part of the program, had no right to operate a Midas Muffler Shop as an alley mechanic's shop, installing both general automotive parts and non-Midas exhaust system parts despite the public's reliance for Midas quality on the Midas name, the Midas guarantee and the Midas exhaust system specialization. The conditions governing the operations of a Midas Muffler Shop were reasonable and necessary, as a matter of law, to assure the American motorist that he would find the products and

services which the Midas advertising represented would be obtained at a "Midas Muffler Shop."[25]

In the *Carvel* litigation, a nationwide system of franchised retail dealers in the soft ice cream industry was tested under the antitrust laws, with the district court, the court of appeals, and subsequently the Federal Trade Commission, holding that the Carvel franchise agreement and its merchandising methods were not proscribed by Section 3 of the Clayton Act. *Susser* v. *Carvel Corp.*, 206 F.Supp. 636 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964); *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965); *Carvel Corp.*, [1965-1967 *Transfer Binder*] Trade Reg. Rep. ¶ 17,298 (FTC July 19, 1965).

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[25] Plaintiffs joined in the Midas national advertising and voluntarily saturated their marketing areas with their own local advertising to gain for themselves the benefits of the Midas image (A 79-80, 87-88, 94-95, 101). These ads demonstrated to the court of appeals plaintiffs' "participation in and co-operation with the defendants in the programs of which they now complain" (A 210-11) and also demonstrate the identification of the Midas trade and service marks and the Midas trade name with all parts of automotive exhaust systems, not just mufflers, and the unique desirability of the Midas guarantee good anywhere in the United States. Typical examples of plaintiffs'. advertisements:

"Look for the MIDAS Sign — America's only coast-to-coast network of exclusive auto muffler shops" (A 50).

"You get only nationally-advertised Midas products. . . . " (A 53).

"We're specialists in just *one* thing . . . your car's exhaust system . . . ." (A 50).

" . . . and always depend on MIDAS muffler tailpipes & dual exhaust systems for complete safety" (A 50, 51).

"Your MIDAS muffler carries a written factory guarantee good from coast-to-coast!" (A 50, 51).

"[Y]ou can depend on MIDAS for the world's finest mufflers, tailpipes and exhaust systems . . ." (A 52).

What the courts said there is equally applicable to the Midas franchise program:

"The franchise system creates a class of independent businessmen; it provides the *public with an opportunity to get a uniform product* at numerous points of sale from *small independent* contractors, rather than from employees of a vast chain. The *franchise system of operation is therefore* good for the economy.

"However, the *cornerstone of a franchise system* must be the *trademark or trade name of a product.* It is this *uniformity of product and control of its quality and distribution* which causes the public to turn to franchise stores for the product." 206 F.Supp. at 640

* * *

"The requirement that only Carvel products be sold at Carvel outlets derives from the desirability that the *public identify each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality. The antitrust laws certainly do not require that the licensor of a trademark permit his licensees to associate with that trademark other products unrelated to those customarily sold under the mark* . . . ." 332 F.2d at 517.

See also: *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714, 719-20 (D. Kan. 1962).

B. Alleged Tying Agreement

Petitioners imply in their instant brief (PB 7-8, 13-14, 20) that they are not claiming damages based on their purchases of the Midas muffler,[26] but they argue that the vice of the Midas program was that they were required

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[26] In their Reply to the Brief in Opposition (p. 5), they were more direct:

"Petitioners, for example, have never claimed and do not now claim that there was anything unlawful about their purchases or sales of the Respondents' MIDAS muffler alone."

to also purchase tail pipes, exhaust pipes and clamps from the defendants. Apart from the indisputable record fact that plaintiffs are claiming direct damages from the purchase of the Midas mufflers alone (Plaintiffs' Answer to Interrogatories, Ross, R 899; Skarupa, R 449; Wheeler, R 793; Pierce, R 617) and apart from the fact that the Midas trade and service marks did cover tail pipes, exhaust pipes and clamps as well as the muffler (A 106-07), this Court has made clear as recently as *White Motor Co. v. United States,* 372 U.S. 253 at 262-63 (1963), that there is nothing illegal *per se* about this type of arrangement. Mr. Justice Douglas reviewed the decisions in *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1 (1958), and *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), and noted that in those decisions the Court had determined that tying arrangements were not illegal *per se* but that each must be judged in the circumstances of the particular case. They are not illegal in the absence of "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" (372 U.S. at 262) and, in addition, the tying device could be employed "by a small company in an attempt to break into the market" (372 U.S. at 263). The uncontested evidence of the small size of Midas sales[27] in

[27] Petitioners' attribution of $17 million in sales and 350 Midas Muffler Shops in 42 states to the "Respondents" in August 1960 (PB 14) is seriously misleading in that it ignores the early years of 1955-1958 when Midas was attempting to enter the market and states the wrong sales figures for the later years (See Statement, *supra,* pp. 12-13). The only record information indicates that Midas brand sales amounted to $8 million in 1959 and $9 million in 1960 (Jacob Dep. 170). Likewise, there were only 297 Midas Muffler Shops in operation in March 1961 (See Argument, *supra,* note 24, p. 59), only 258 in operation when plaintiffs terminated their franchises (A 72) and only 120 in operation in 1957 (A 71).

comparison with the giants in the automotive business, and of the introduction and evolution of the Midas program in the automotive parts market conclusively establish that Midas meets both these conditions.

C. The Guarantee

The unique guarantee of replacement of any Midas muffler at any Midas Muffler Shop throughout the nation was an attraction of the Midas program which "excited" consumers as well as the dealers; *e.g.*, Mr. Ross (A 138), and it was the dealers who insisted on promoting it as a sales tool and integral part of the program (Statement, *supra*, p. 11-12). As a result of this dealer pressure, defendants continued to underwrite 100% of the guarantee replacement expense until January 1, 1959. At a meeting with the National Advisory Council in Chicago in November 1958, defendants suggested to the dealers that if the dealers were willing to share this burden on a 50-50 basis, the defendants would use the proceeds of this change to provide a heavier gauge muffler with a longer anticipated life. At that time Mr. Pierce, who said he was present at the meeting, thought that "this was a good idea," (Pierce Dep. 173), but he and others did not think that the change should apply except to further replacements of the new muffler which became generally available in January of 1959 (Pierce Dep. 171-73). Naturally the dealers were not eager to share the replacement burden, but the decision was adopted by the National Advisory Council as an economic fact of life. To now describe this course of action as "reneg[ing] on their original promise" or as a "unilateral" change in the guarantee (PB 5, 13) con-

tradicts plaintiffs' own testimony and other undisputed facts in the record.[28]

Moreover, if it is true, as petitioners allege, that it was the change in the expense of the guarantee which caused a "Reappraisal of Program" by the petitioners (PB 13), any claim for damages for violations of the antitrust laws automatically fails. No allegation is or could be made that the guarantee program standing alone constituted a violation of Section 1 of the Sherman Act or Section 3 of the Clayton Act. By not "reappraising" their part in the Midas program until the change in the guarantee, plaintiffs acknowledge that up to that time they were totally committed to and participated without qualification in that program. They now make clear that they were not really complaining of the franchise restrictions alleged to be in violation of the antitrust laws because all these restrictions had been in effect long before January 1959. The fact is that plaintiffs, both before and after the change, wanted more, not less, of the Midas franchises. Wheeler and the other plaintiffs were not satisfied with their financial success as Midas dealers; they wanted "exclusive franchises" to protect their monopolies beyond their respective marketing areas—Ross for all of Michigan; Skarupa for the entire Washington, D.C. area; Wheeler for Metropolitan St. Louis; and Pierce for all of central New York state.

[28] Contrary to petitioners' assertions (PB 5, 13), none of the forms of contract contained any provision for a continuing 100% guarantee of the Midas muffler by the defendants. The franchise provided only that "Seller agrees, during the continuance of this agreement, to replace and/or adjust to the Buyer any merchandise purchased from the Seller by the Buyer within the limits of such specific guarantees as Seller furnishes" (A 42-43).

They decided they no longer needed the Midas trademarks, service marks and other Midas aid and assistance to operate their business and they wanted to include in their operations the sale of allied automobile products and the passing off of inferior and cheaper goods as those of the trademark they represented. When the ex-Midas field counselor offered them this opportunity with the Robin Hood program they abandoned Midas and embraced his offer. Robin Hood gave them the exclusive franchises in all the territory which they wished to monopolize and allowed them to do everything they claimed Midas prevented them from doing, but with "Robin Hood" instead of the "Midas" name and guarantee. In the Robin Hood program, despite the addition of sales of allied automobile products, cheaper mufflers, and brake and front end service to his operations, each plaintiff's sales declined and profits likewise gradually diminished and eventually disappeared (A 81-82, 89-90, 97, 101-104). However, instead of convincing them of the wisdom of the Midas approach and the Midas program, this disappointment in the benefits of Robin Hood led to an increased hostility to Midas and eventually to the initiation of this antitrust treble damage suit.

D. Reasonableness of the Midas Program

The issue of the reasonableness of the Midas franchise plan was included in defendants' motion for summary judgment (A 62-62a), but not ruled upon by either court below (A 216) since the *in pari delicto* defense would apply even if the program were illegal. Defendants are not arguing the matter at this time except to demonstrate defendants' good faith and to correct any impression, which

plaintiffs with the benefit of hindsight[29] have attempted to create, that the defendants intended at any time to violate any antitrust or any other law.

The issue here is not, as it might be in a government case, whether the 1955 Midas franchise is *now* illegal under the 1968 interpretations of the statutes. The issue is solely whether these plaintiffs in the circumstances of this case as they existed from 1955 to 1959 should be permitted to obtain still more profits in addition to the substantial amounts they enjoyed from their Midas operations during those years; it is the facts *and the law* which existed as of that time which should determine that issue. Defendants amended their franchise agreements in February 1960 *before* this Court's decision in *Parke, Davis* and the other cases on which petitioner relies, *before* this complaint was ever filed and *before* any threats or promises of such actions by the plaintiffs. The change was made *before* the Cleveland, Ohio grand jury investigation of the automobile replacement parts industry culminated in 1960 in the civil complaint in *United States* v. *The A P*

[29] The first Midas contracts were executed almost nine years and the complaint was filed four years prior to this Court's decision in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); and, of course, the other cases such as *United States* v. *General Motors,* 384 U.S. 127 (1966) and *United States* v. *Schwinn,* 388 U.S. 365 (1967) relied on most extensively by the plaintiffs, were not decided until some seven years after plaintiffs had left the Midas program. Even *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960) had not been decided when plaintiffs cancelled their contracts and, in fact, of the 39 authorities listed by the plaintiffs in their Table of Citations, no less than 24 bear dates subsequent to the filing of the complaint herein and only three of the eleven cases cited as authority for the illegality of the contracts (PB 19) were decided prior to 1959.

Parts Corp. and Goerlich's Inc., Civ. No. 8541, N.D. Ohio W.D. (Nov. 10, 1960) cited by petitioners (PB 14). Representatives of International Parts testified before, and its documents were presented to, that grand jury. However, no action was filed against the defendants even though the civil action commenced against one of its larger competitors alleged among other things illegal exclusive arrangements with dealers. Since that date the Antitrust Division of the Department of Justice has regularly requested information concerning Midas operations, and as recently as October 1967, the current franchise which differs little from Appendix B was furnished to and reviewed by the Division. To the extent relevant here, the reasonableness of the Midas franchise program has been established and petitioners should not be allowed to divert attention from the basic issue of their own participation in the founding, development and growth of the Midas program so as to render them *in pari delicto*.

III. DISMISSAL OF COUNT ONE ON THE ALTERNATIVE GROUND THAT THE ACTIONS OF THE DEFENDANTS HERE WERE THOSE OF A SINGLE INTEGRATED BUSINESS ENTITY WAS CORRECT

Nowhere in petitioners' discussion of the alleged error of the courts below with respect to the alternative ground of dismissal is there a single citation to the record (PB 38-40) although the brief contains numerous unsupportable assertions. As the trial court reminded the plaintiffs (A 111), and as made clear in the following section, Rule 56 on summary judgments and the decisions interpreting it re-

quire more than assertions of counsel to avoid judgment when as here, the motion was supported by affidavit and other evidence.[30]

What is in the record is the uncontradicted affidavit of the two principal individual defendants, chief executive officers of the corporate defendants, who unequivocally state that they "owned or controlled" "each of the corporate defendants" and that they "jointly managed the corporate defendants and directed the activities which the other individual defendants performed for International Parts, by whom they were employed and paid" (A 65). The affidavit also establishes that Midas, Inc., had no employees and sold no products and was merely the corporate shell to hold the rights to the Midas trademarks, trade names, service marks and franchise agreements for its parent, International Parts (A 67). Muffler Corporation was a manufacturing subsidiary and Powell Manufacturing was a distributing subsidiary and without dispute neither of them had any contact with, relationship to, or effect upon the plaintiffs (A 65).

Apparently recognizing that it is an "absurd assertion" that these individual defendants, acting only in their normal employment capacities were conspiring or that such

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[30] Rule 56(e) (App. A) provides in part:

"When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials* of his pleading, but *his response, by affidavits or as otherwise provided in this rule, must set forth specific facts* showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In *White Motor Co.* v. *United States,* 372 U.S. 253, 254-55 (1963), the Court explains that the 1963 amendment added a more stringent requirement and imposed a greater burden for those opposing summary judgment.

activities constitute conspiracy, *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), plaintiffs abandoned that argument in the court of appeals (Appellants' Brief, pp. 34-36; Appellants' Reply Brief, pp. 6-7, No. 15862 (7th Cir. 1967). They now attempt to revive this contention and continue to insist that a conspiracy existed among the wholly-owned subsidiaries (PB 38-39). However, both their factual assertions and their legal conclusions are unfounded.

Hundreds of pages of deposition testimony and the Sherman affidavit contradict the petitioners' assertion that Midas, the corporate shell, sold or refused to sell Midas brands to International brand customers (PB 38); Midas sold no goods (A 67). Likewise, the contention that International would not sell International brand mufflers "to the Midas franchisees" is conclusively refuted by Pierce's testimony, quoted at length in the Statement, *supra*, p. 18, that he bought International mufflers for his retail business all during his Midas period (A 92).

Similarly unsubstantiated is the assertion that somehow Midas and International held themselves out as "competitors" or as "separate and 'divorced'" (PB 38-39).[31] Nothing could be farther from the fact as clearly established by the allegations and legal theory in Count Three of the complaint. Only International Parts sold or purchased goods, had a payroll, or dealt with plaintiffs or other purchasers of exhaust parts and it was on the basis of this known and undisputed fact that plaintiffs claimed, in Count Three, that a single seller, International Parts,

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[31] As the district court said and the court of appeals adopted:

"There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with each other or acted in any manner other than as a single integrated business." (A 112-13, 215).

sold to Midas dealers at a different price than it sold to its other purchasers. International Parts did sell two brands of mufflers—International and Midas—but to the extent possible to two different classes of trade—jobbers or wholesalers for International—installers for Midas. There was no national advertising or promotion of the International brand even remotely approaching the Midas concept and defendants never provided International customers with any of the benefits of the Midas program. Nothing in this record supports an assertion as to the existence here of a horizontal conspiracy of the type condemned in *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U.S. 211 at 215 (PB 39).

Defendants have never contended that, solely because of the common ownership and control of the corporate defendants, they were immune from the antitrust laws. But as the Court pointed out in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 at 227 (1947) on which *Kiefer-Stewart* depends:

> "The corporate interrelationships of the conspirators, in other words, are *not determinative* of the applicability of the Sherman Act. That statute is aimed at *substance* rather than form."

Here, the *substance* of the corporate relationships is undisputed—a single family-owned and operated business entity using several corporations.[32]

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[32] Cases since *Kiefer-Stewart* holding that an integrated enterprise cannot combine or conspire with itself include the following: *Alpha Distributing Co.* v. *Jack Daniel's Distillery,* 207 F.Supp. 136, 137-38 (N.D. Cal. 1961), *aff'd,* 304 F.2d 451 (9th Cir. 1962); *Schwing Motor Co.* v. *Hudson Sales Corp.,* 138 F.Supp. 899, 905-907 (D. Md. 1956), *aff'd,* 239 F.2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957); *Hudson Sales Corp.* v. *Waldrip,* 211 F.2d [illegible] 273 (5th Cir.), *cert. denied,* 348 U.S. 821 (1954).

If plaintiffs had any evidence to contradict the affidavit of Nathan and Gordon Sherman, it should have been presented in a counteraffidavit or by other record material.[33] Their failure to do so, coupled with the failure of any plaintiff to profess any knowledge of facts concerning the alleged conspiracy in his deposition (A 84, 91, 98, 105), which testimony has not been denied, supplemented, or explained, conclusively established that there is no genuine issue of any material fact and that summary judgment on the Sherman Act allegations was the proper remedy, *Markwell* v. *General Tire & Rubber Co.,* 367 F.2d 748 (7th Cir. 1966); *S & S Logging Co.* v. *Barker,* 366 F.2d 617, 622-23 (9th Cir. 1966).

Thwarted by the district court in their attempt to fragmentize by pleadings and unfounded assertions "a unified business to meet the conspiracy requirements of the Sherman Act" (A 113), plaintiffs shifted their position in the court of appeals to contend that the franchise contracts with plaintiffs themselves constituted a combination in restraint of trade. The same digression is made here (PB 40). However, plaintiffs cannot deny their allegations in Count One of a horizontal combination or conspiracy among the defendants and "other co-conspirators *unknown*" (Statement, *supra,* p. 4; A 17), a description which patently did not refer to plaintiffs and the other known franchisees.

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[33] Plaintiffs took extensive depositions of Gordon Sherman and other officers of defendants. Although these depositions exhaustively covered the defendants' intracorporate activities, plaintiffs never offered any of this deposition testimony.

IV. SUMMARY JUDGMENT WAS APPROPRIATE IN THIS ANTITRUST SUIT SINCE NO DISPUTED MATERIAL FACTS EXIST

"Summary judgments have a place in the antitrust field, as elsewhere . . .," *White Motor Co.* v. *United States,* 372 U.S. 253, 259 (1963),[34] albeit their use is limited in "complex antitrust litigation where motive and intent play leading roles . . . [and] the proof is largely in the hands of the alleged conspirators." *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962).[35] But motive and intent play no role in the factual or legal issues of the *in pari delicto* defense here asserted, nor does the proof lie with the alleged conspirators.

The only material issues are the franchise agreements

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[34] This has also been recognized by the lower courts: *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.,* 306 F.2d 61, 64-5 (3d Cir.), *cert. denied,* 371 U.S. 951 (1962); *United States* v. *Johns-Manville Corp.,* 237 F.Supp. 885, 892-93 (E.D. Pa. 1964); *Cohen* v. *Curtis Publishing Co.,* 31 F.R.D. 569, 575 (D. Minn. 1962), *aff'd,* 312 F. 2d 747 (8th Cir.), *cert. denied,* 375 U.S. 850 (1963); and *Bond Dist. Co.* v. *Carling Brewing Co.,* 32 F.R.D. 409, 415 (D. Md. 1963).

[35] None of petitioners' cases other than *Poller* (PB 41) considered the appropriateness of summary judgment, and thus are inapplicable here. In *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964) and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), summary judgments were reversed on matters of substantive law, but the Court did not question the procedure. A motion to dismiss and a directed verdict were involved in *Radovich* v. *National Football League,* 352 U.S. 445 (1957), and *Continental Ore Company* v. *Union Carbide Corp.,* 370 U.S. 690 (1962).

themselves[36] and the conduct of the plaintiffs. Proof of the plaintiffs' active participation which has made them *in pari delicto* came almost totally from their own uncontradicted testimony and their own undisputed conduct. There has been an "exhaustive discovery procedure" which had been "completed" on this issue (Pet. Cert. 29, n. 49); the plaintiffs had produced all relevant documents (over 350,000 of them), answered extensive written interrogatories and provided 1605 pages of deposition testimony. The proof could come from no better source.

If the summary of the testimony of the individual plaintiffs in defendants' trial court Appendix (A 73-105) were an inaccurate or erroneous statement of the record, then plaintiffs should have availed themselves of the obligations and remedies of Rule 56 (e) and (f).[37] But plaintiffs filed no counteraffidavits. Instead, by means of a motion to strike after the summary judgment motion briefs were submitted, plaintiffs sought additional discovery on the *very limited* factual situation surrounding defendants' technical registration of the Midas trade and service marks (R 1343-54). By so responding to defendants' motion and

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[36] Plaintiffs have never claimed, "that any restriction was imposed by defendants other than those provided in the franchise agreements" (A 207) so that the contractual arrangement to which both parties agreed is the *sole basis* of petitioners' lawsuit and no genuine factual issue could be raised on this aspect.

[37] Paragraph (e) of Rule 56 provides for filing "depositions, answers to interrogatories, or further affidavits," while paragraph (f) permits continuances or other delays for the parties to obtain affidavits, further discovery or such other procedures as may be just (App. A).

supporting material, plaintiffs acknowledged that all of the material facts relating to *in pari delicto* were within the record and therefore accepted defendants' Appendix of the testimony and the Sherman affidavit as accurate and complete facts.

But petitioners now assert a "right to a decision on the merits" (PB 41) based upon counsel's allegations that factual disputes exist with respect to the "existence of legal coercion," "the existence of a conspiracy," and Pierce's termination (PB 42). Answering similar assertions below, the district court pointed out that the "depositions of the individual plaintiffs, quoted from in defendants' brief" were "uncontroverted except by counsels' arguments" (A 110). If there were *evidence* to justify a trial, plaintiffs should readily be able to, and in fact must, set forth those portions of the record which the courts below failed to consider and which demonstrate the error. Likewise, plaintiffs should readily be able to demonstrate *from the record*, that plaintiffs were "coerced" into accepting their initial and the many subsequent Midas franchise agreements, that defendants were not a single integrated business entity, and that Pierce did not write DX 56 (A 172) assuring Midas of his willingness "to cooperate fully" in his termination. The absence of any such record citations is ample proof that the courts below were correct in holding that "no genuine factual controversy exists . . . ." and that summary judgment was entirely proper in this case.

CONCLUSION

For the reasons set forth above the decision of the court of appeals should be affirmed.

Respectfully submitted,

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